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No. 12407

United States
Court of Appeals
for the Ninth Circuit.

SAMUEL H. FRIEND, S. HERBERT FRIEND, LEONARD V. BLOCK, Co-Partners, Doing Business Under the Firm Name and Style of S. H. Friend, and Feature Ring Co., Inc.

Appellants,

vs.

GRANAT BROS., a Corporation,

Appellee.

and

GRANAT BROS., a Corporation,

Appellant,

vs.

SAMUEL H. FRIEND, S. HERBERT FRIEND and LEONARD V. BLOCK, Co-Partners, Doing Business Under the Firm Name and Style of S. H. Friend and Feature Ring Co., Inc.,

Appellees.

Transcript of Record
IN FOUR VOLUMES
Volume I
(Pages 1 to 86)

Appeals from the United States District Court, Northern District of California, Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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MELLIN AND HANSCOM,

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391 Sutter Street,
San Francisco, California.
Attorneys for Plaintiff.

In the United States District Court, Northern District of California, Southern Division

Civil Action No. 28219H

GRANAT BROS., a corporation,

Plaintiff,

vs.

SAMUEL H. FRIEND, S. HERBERT FRIEND and LEONARD V. BLOCH, copartners, doing business under the firm name and style of S. H. Friend,

Defendants.

COMPLAINT FOR TRADE-MARK INFRINGEMENT AND UNFAIR COMPETITION

Comes Now the above named plaintiff and for cause of action against the defendants above named, complains and alleges as follows:

I.

Plaintiff alleges that it is a corporation duly organized and existing under and by virtue of the laws of the State of California, and has a place of business in the City and County of San Francisco, State of California.

II.

Plaintiff is informed and believes and on information and belief alleges that the defendants Samuel H. Friend, S. Herbert Friend and Leonard V. Bloch are copartners, and all residents of the City

and County of San Francisco, State of California, and are doing business under the firm name and style of S. H. Friend and have a place of business in the City and County of San Francisco, State of California.

III.

Plaintiff alleges that this Court has jurisdiction of this cause in that it arises under the trade-mark laws of the United States concerning infringement of trade-marks duly registered under the laws of the United States, and that the value of the matter in controversy, exclusive of interest, exceeds the amount of $3,000.00.

IV.

Plaintiff alleges that it is the owner of all the right, title and interest in and to the trade-mark "Wedlock," and that said trade-mark "Wedlock" was registered in the United States Patent Office on June 10, 1924, certificate of registration No. 185,365, and that said certificate registration was assigned to plaintiff together with the good-will of the business in said trade-mark, and that plaintiff, ever since the assignment thereof, has been and now is the owner of all the right, title and interest therein and thereto.

V.

Plaintiff alleges that it is the owner of all the right, title and interest in and to the trade-mark "Wed-Lok"; that said trade-mark "Wed-Lok" was registered by said plaintiff in the United States

Patent Office for finger rings, and said registration bears No. 430,436, and is dated June 10, 1947.

VI.

Plaintiff further alleges that said trade-marks have been applied by plaintiff to finger rings sold in interstate commerce by said plaintiff continuously since the year 1934.

VII.

Plaintiff alleges that it is now engaged in and for many years past has been continuously engaged in the business of designing, manufacturing and selling finger rings, to which said trade-marks have been applied, throughout the entire United States of America, its territories and possessions, and has built up a large and enviable reputation and good-will in connection with said business, and that the value of said good-will is in excess of $25,000,000.00, and that the said trade-mark is applied to its said finger rings or to packages containing the same.

VIII.

Plaintiff alleges that it has spent large sums of money in advertising its said trade-marked finger rings throughout the entire United States of America, and since the year 1934 the sums so spent total in excess of $100,000.00, and that said advertising consists solely in advertising of its finger rings known and trade-marked with plaintiff's said trade-marks.

IX.

Plaintiff alleges that the retail sales value of its finger rings so trade-marked and sold by plaintiff exceeds the sum of $2,500,000.

X.

Plaintiff alleges that for more than twelve (12) years last past its said trade-marks have been understood by the public and the trade as designating the finger rings and business of the plaintiff, and has been so exclusively identified with the finger rings and business of plaintiff as to have acquired a secondary meaning as to indicate the finger rings and business of plaintiff and its alone.

XI.

Plaintiff alleges that the defendants are in the business of wholesale selling finger ring sets consisting of a wedding band and engagement ring, which defendants identify by the use of the words "Feature-Lock," and has thereby infringed upon the trade-mark rights of this plaintiff.

XII.

Plaintiff alleges that the said ring sets sold by this plaintiff under its trade-marks and the ring sets sold by these defendants under the name "Feature-Lock" are goods of the same character and are directly competitive products.

XIII.

Plaintiff alleges that the mark used by defend-

ants "Feature-Lock" and the plaintiff's trade-marks are so confusingly similar that the purchasing public is likely to be deceived, and that the "Feature-Lock" finger ring sets of defendants can be palmed off on the public as the finger ring sets of this plaintiff.

XIV.

Plaintiff alleges that the mark "Feature-Lock" used by defendants is confusingly similar to plaintiff's said trade-mark.

XV.

Plaintiff alleges that the mark "Feature-Lock" applied by defendants to finger rings would cause confusion in the minds of the purchasing public who would believe that the finger ring sets sold under the said mark were the finger ring sets of this plaintiff.

XVI.

Plaintiff is informed and believes and on information and belief alleges that the words "Feature-Lock" have been and are being applied by defendants to finger rings with fraudulent intent on the part of the defendants to pass off its said finger rings as and for the finger ring sets of plaintiff with the purpose to deceive the public and enable the defendants to trade on the name and good-will of plaintiff.

XVII.

Plaintiff alleges that the defendants' use of the words "Feature-Lock" on its products has caused

and will continue to cause confusion between the finger ring sets of plaintiff and defendants, and that such confusion likely will have the effect of destroying the business, good-will and reputation heretofore established by plaintiff, all to the damage of plaintiff.

XVIII.

Plaintiff is informed and believes and on information and belief alleges that unless restrained by this Court, the defendants will continue to infringe on the rights of plaintiff and continue defendants' acts of unfair competition, all to the irreparable injury of plaintiff.

XIX.

Plaintiff alleges that it has no other speedy and adequate remedy save by this suit for an injunction.

XX.

Plaintiff is informed and believes and on information and belief alleges that defendants have derived unlawful gains and profits from their infringing acts, aforesaid, which plaintiff would otherwise have received but for such infringement by defendants.

XXI.

Plaintiff is informed and believes and on information and belief alleges that the acts of the defendants herein set forth have caused damage to plaintiff's business in an amount that cannot at this time be determined but is informed and believes and on information and belief alleges that said damage is in an amount in excess of $5,000.00.

Wherefore Plaintiff Prays:

1. That defendants be required to appear and answer this complaint.

2. That a permanent injunction issue out of and under the seal of this Court, enjoining the defendants, their associates, officers, attorneys, clerks, servants, agents, employees and confederates, and each of them, from using the trade-mark "Feature-Lock" in any fashion whatsoever in connection with any business or products relating to finger rings.

3. For an accounting of profits and damages for the acts of trade-mark infringement committed by the defendants.

4. That plaintiff have and recover from defendants its actual damages sustained by reason of the infringement and unfair competition of defendants.

5. That said profits and damages be trebled in view of defendants' deliberate, intentional and fraudulent infringement and interference with the business of plaintiff.

6. That plaintiff have its costs and disbursements herein and for such other and further or different relief that the Court may deem appropriate in the premises.

GRANAT BROS., a corporation,

By /s/ OSCAR A. MELLIN,
Of Mellin and Hanscom,
Attorneys for Plaintiff.

[Endorsed]: Filed August 3, 1948.

In the United States District Court, Northern District of California, Southern Division

Civil Action 28219H

GRANAT BROS., a corporation,

Plaintiff,

vs.

SAMUEL H. FRIEND, S. HERBERT FRIEND and LEONARD V. BLOCH, copartners, doing business under the firm name and style of S. H. Friend,

Defendants.

Civil Action No. 28220H

GRANAT BROS., a corporation,

Plaintiff,

vs.

HERBERT BROWN, an individual,

Defendant.

STIPULATION CONSOLIDATING CASES FOR TRIAL

It is hereby stipulated and agreed by and between counsel for the above entitled parties that the two

above identified actions may be consolidated for trial for the convenience of the Court and parties.

JAMES M. NAYLOR,
NAYLOR AND LASSAGNE,
JOHN VAUGHAN GRONER,

By /s/ JAMES M. NAYLOR,
Attorneys for Defendants.

OSCAR A. MELLIN,
LEROY HANSCOM,
JACK E. HURSH,

By /s/ OSCAR A. MELLIN,
Attorneys for Plaintiff.

It Is So Ordered:

Dated: August 23rd, 1948.

/s/ GEORGE B. HARRIS,
U. S. District Judge.

[Endorsed]: Filed August 23, 1948.

District Court of the United States, Northern District of California, Southern Division

At A Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 23rd day of August, in the year of our Lord one thousand nine hundred and forty-eight.

Present: The Honorable George B. Harris, District Judge.

Ordered Cases Consolidated for Trial

Civ. No. 28219H, Granat Bros, etc. vs. Samuel H. Friend, et al.;

Civ. No. 28220H, Granat Bros, etc. bs. Herbert Brown, etc.;

In accordance with a stipulation and order this day filed, it is Ordered that these cases be and the same are hereby consolidated for trial.

[Title of District Court and Causes.]

STIPULATED INTERVENTION OF FEATURE RING CO., INC. AS A DEFENDANT

It is hereby stipulated by and between counsel for the above-entitled parties that Feature Ring Co., Inc., a corporation, may intervene in the above-entitled consolidated actions as a party defendant.

It is further stipulated and agreed that said Feature Ring Co., Inc., as an intervening defendant, and the above-named defendants may file a consolidated answer to the complaint on file herein.

OSCAR A. MELLIN,
LEROY HANSCOM,
JACK E. HURSH,
By /s/ OSCAR A. MELLIN,
Attorneys for Plaintiff.

NAYLOR AND LASSAGNE,
JAS. M. NAYLOR,
JOHN VAUGHAN GRONER,
By /s/ JAS. M. NAYLOR,
Attorneys for Defendants.

It Is So Ordered: October 15, 1948.

/s/ GEORGE B. HARRIS,
U. S. District Judge.

[Endorsed]: Filed October 15, 1948.

[Title of District Court and Causes.]

CONSOLIDATED ANSWER

Come Now defendants, S. Herbert Friend, Leonard V. Bloch and Herbert Brown, and the intervening defendant, Feature Ring Co. Inc., by their attorneys, Naylor and Lassagne, and for their answers to the complaint of plaintiff herein, allege:

1. Defendants admit the allegations in paragraph I of the complaints herein.

2. Defendants S. Herbert Friend and Leonard V. Bloch admit that they are residents of the City and County of San Francisco, State of California, and that they are copartners, S. Herbert Friend being a general partner, and Leonard V. Bloch a limited partner, doing business under the firm name and style of S. H. Friend, with a place of business in the City and County of San Francisco, State of California, but deny that Samuel H. Friend, deceased, or his estate, has any interest in said copartnership.

Defendant Herbert Brown admits that he is a resident of Salinas, County of Monterey, State of California, and is there doing business.

Intervening defendant, Feature Ring Co., Inc., states that it is a corporation organized and existing under the laws of the State of New York with a place of business in the City and County of New York, State of New York.

3. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph III of the complaints herein.

4. Defendants admit that certificate of registration No. 185,365 on the word "Wedlock" was issued by the United States Patent Office on June 10, 1924, but deny each and every other allegation in paragraph IV of the complaints herein.

5. Defendants admit that certificate of registra-

tion No. 430,436 on the word "Wed Lok" for finger rings was issued by the United States Patent Office to plaintiff on June 10, 1947, but deny each and every other allegation in paragraph V of the complaints herein.

6. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph VI of the complaints herein.

7. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph VII of the complaints herein.

8. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph VIII of the complaints herein.

9. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph IX of the complaints herein.

10. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph X of the complaints herein.

11. Defendants S. Herbert Friend and Leonard V. Bloch admit that they are in the business of wholesale selling finger rings, including wedding band and engagement ring sets sold under the trade-

mark "Feature Lock," but defendants S. Herbert Friend and Leonard V. Bloch deny that they have infringed upon any trademark rights of plaintiff.

Defendant Herbert Brown admits that he is in the business of retail selling finger rings, including wedding band and engagement ring sets sold under the trademark "Feature Lock," but defendant Herbert Brown denies that he has infringed upon any trademark rights of plaintiff.

Defendant Feature Ring Co., Inc. admits that it is in the business of manufacturing and selling at wholesale ring mountings or blanks and interlocking ring mountings or blanks under the trade mark "Feature Lock," which mountings or blanks are employed by jeweler customers to prepare finger ring sets consisting of a wedding band and engagement ring, but defendant Feature Ring Co., Inc. denies that it has infringed upon any trademark rights of plaintiff.

12. Defendants admit the allegations contained in paragraph XII of the complaints herein.

13. Defendants deny the allegations contained in paragraph XIII of the complaints herein.

14. Defendants deny the allegations contained in paragraph XIV of the complaints herein.

15. Defendants deny the allegations contained in paragraph XV of the complaints herein.

16. Defendants deny the allegations contained in paragraph XVI of the complaints herein.

17. Defendants deny the allegations contained in paragraph XVII of the complaints herein.

18. Defendants deny the allegations contained in paragraph XVIII of the complaints herein.

19. Defendants deny the allegations contained in paragraph XIX of the complaints herein.

20. Defendants deny the allegations contained in paragraph XX of the complaints herein.

21. Defendants deny the allegations contained in paragraph XXI of the complaints herein.

For a First, Separate and Complete Affirmative Defense to the Complaints Herein, Defendants Allege:

22. That the rings on which plaintiff alleges it has used its alleged trademarks "Wedlock" and "Wed Lok" are sets of interlocking wedding and engagement rings as is shown in the sample advertisement of plaintiff appearing in the May 1948 issue of "Pacific Goldsmith" at page 25, a copy of which is annexed hereto as Exhibit "A."

23. That the rings on which all defendants herein have used the trademark "Feature Lock" are sets of interlocking wedding and engagement rings manufactured by the intervening defendant, Feature Ring Co., Inc., and sold by it to defendants S. Herbert Friend and Leonard B. Bloch, and sold by them to defendant Herbert Brown; that said trademark "Feature Lock" comprises the principal

word "Feature" of said intervening defendant's corporate name and the purely descriptive word "lock," which is descriptive of the means by which said wedding and engagement rings are held together.

24. That any mark including the word "lock," or any misspelling thereof, such as "lok," when applied to such interlocking articles, becomes descriptive, at least as to such part of said mark consisting of the word "lock," or any misspelling thereof, and no exclusive rights can arise in such descriptive part.

25. That the United States Patent Office has recognized the principle that no exclusive rights can arise in the descriptive word "lock" in granting, among others, the following registrations on trade marks including the word "lock" and various misspellings thereof:

Mark	Reg. No. & Reg. Date	Goods	Owner
Wed-Luck	411,415 1/16/45	Jewelry: Rings, Lockets, Bracelets	S. & S. Mfg. Co., Providence, R.I.
Gemlock	357,056 5/24/38	Bracelet Attachments	Gemex Co., Newark, N.J.
Turnlock	378,374 6/4/40	Necklaces and Watch Bracelets	Gemex Co., Newark, N.J.
Dubl-Lock	355,462 3/15/38	Key rings	Forstner Chain Corp., Irvington, N.J.
Dubl-Lock	349,128 8/17/37	Watch bracelets	Jacques Kreisler Sales Corp., New York, N.Y.

Mark	Reg. No. & Reg. Date	Goods	Owner
Inter-Locking	328,054 9/10/35	Finger rings	Joseph Granat, San Francisco, Calif.
Nu-Lock	290,981 1/19/32	Personal jewelry, not including watches	Freeman-Daughaday Co., Providence, R.I.
Sta Lokt & design	Not yet issued, Pub. 6/8/48	Cuff buttons	J. F. Sturday's Sons Co., Attleboro Falls, Mass.
Locked-In Love	432,290 8/26/47	Finger rings	Untermeyer, Robbins & Co., New York, N.Y.
Lokit & design	276,885 10/28/30	Belt buckles	A. Rosenberg & Co., Boston, Mass.
Wood-Lok	431,603 7/29/47	Resin and starch adhesives	National Starch Products, Inc., New York, N.Y.
Load-Lok	425,121 11/5/46	Resin and starch adhesives	National Starch Products, Inc., New York, N.Y.
Plastilock	415,176 7/31/45	Adhesive cements made from synthetic plastics	B. F. Goodrich Co. New York, N.Y. & Akron, Ohio
Wedgelock	405,967 2/29/44	Sliding closure fasteners for cosmetic bags, change purses, etc.	Corona Enterprises, Inc., New York, N.Y.
Vulcalock	234,182 10/18/27 Renewed	Adhesive cement	B. F. Goodrich Co. New York, N.Y.
Bondlok	428,651 4/1/47	Slide fasteners	Herman Snyder, d.b.a. Bondlok Products Co., New York, N.Y.

Mark	Reg. No. & Reg. Date	Goods	Owner
Gazlok	425,424 11/19/46	Anti-siphoning theft guards for gas tanks	Jafber Mfg. & Sales Co. Inc. to Wm. Jaffa, Minneapolis, Minn.
Dualock	425,372 11/12/46	Lock nuts	Easy Washing Machining Co., Ltd., Toronto, Can.
Adelock	418,693 1/8/46	Self locking nuts and fasteners	Adel Precision Products Corp., Burbank, Calif.
Nescolok	415,404 8/7/45	Machine screw and washer unit fasteners	New England Screw Co., Keene, N.H.
Gaplock & design	383,346 12/3/40	Adhesive friction tape	Garlock Packing Co., Palmyra, N.Y.
Grainlock	351,699 11/2/37	Polishing-wheel cement	Industrial Lubricants Co., Detroit, Mich.
Ce-Lok	348,294 7/20/37	Liquid cements for leather, metal, glass, etc.	Albert H. Mitchell, Bellerose, L.I., N.Y.
Inlock	318,284 10/23/34	Adhesive cement	Inland Mfg. Co., Dayton, Ohio
Ruglock & design	304,791 7/18/33	Latex sizing for backs of rugs, mats, etc.	American Curatex Corp., Quincy, Mass.
Hammer Lock	414,359 6/5/45	Pipe unions	Turbolite Co., Houston, Texas
Everlock	405,720 2/15/44	Bolts and other threaded elements	Thompson Bremer & Co., Chicago, Ill.
Laylock	404,506 11/30/43	Wire rope clamps	Bethlehem Steel Co., Bethlehem, Pa.
Maximlok	399,884 2/2/43	Box hinges	H. D. Greenman d.b.a. Maximlok Co., Brooklyn, N.Y.

Mark	Reg. No. & Reg. Date	Goods	Owner
Millok	395,491 5/26/42	Metal pipe fittings	C. Mueller, d.b.a. Mueller Spec. Mfg. Co., Chicago, Ill.
Valok	388,751 7/8/41	Brackets for venetian blinds	Lorentzen Hardware Mfg. Corp., New York, N.Y.
Ledilok	377,395 4/30/40	Expansion shields	U.S. Expansion Bolt Co., York, Pa.
Spiralok	374,723 1/23/40	Metal pipe fittings	Pacific Pipe Co. San Francisco, Calif.
Durolok	373,608 12/12/39	Slide operated fasteners	Standard Products Corp., New York, N.Y.
Line Lok & design	381,542 9/20/40	Clothes line holders, pulleys, blocks, etc.	F. W. Sauer, d.b.a. Fred W. Sauer Mfg. Co., Newark, N.J.
Dix-Lock	384,909 2/4/41	Metal pipe and hose couplings	Dixon Valve & Coupling Co., Philadelphia, Pa.
Speedlock	350,844 10/5/37	Hose fittings	Cleveland Brass Mfg. Co., Cleveland, Ohio
Polox	279,518 1/20/31	Combined adhesive cement and solder	Plox Mfg. Co., Merriam, Kans.

26. That neither plaintiff nor any other member of the public has any exclusive right to the use of the descriptive word "lock," or any misspelling thereof, such as "lok," and that it would be contrary to equity and good conscience and the spirit of the law and statute pertaining to trademarks to

permit plaintiff to extend the rights, if any, covered by the registrations mentioned in paragraphs IV and V of the complaints herein, as allegedly owned by plaintiff, to preclude defendants from free and lawful use of the trademark "Feature Lock" on their goods.

For a Second, Separate and Complete Affirmative Defense to the Complaints Herein, Defendants Allege:

27. That in failing to move to oppose or cancel any or all of the trademark registrations pertaining to rings, bracelets, jewelry and other goods of the same descriptive properties set forth in paragraph 25 above, plaintiff has been guilty of such acquiescence in the use by others of marks including the word "lock," or various misspellings thereof, such as "lok," on goods of the same descriptive properties, as to have destroyed all of its alleged trademark rights, if any ever existed, in the marks "Wedlock" and "Wed Lok," at least as far as the words "lock" and "lok" are concerned, and by such acquiescence plaintiff is estopped from objecting to defendants' use of "Feature Lock" on their rings.

For a Third, Separate and Complete Affirmative Defense to the Complaints Herein, Defendants Allege:

28. That besides the registered uses by the various owners of trademarks, including the word "lock" and various misspelling thereof, such as

"lok," listed in paragraph 25 above, the following parties, among others, also use unregistered marks including the word "lock" and various misspellings thereof, such as "lok," on the goods indicated:

Mark	Goods	Owner
Life-Lok	Interlocking wedding and engagement rings	Manne & Son
Snap-Lock	Clip device to hold wedding and engagement rings together	Royal Jewelry Stores, N.Y., N.J., Conn. and Pa.
Flex-Let Tru•Lock: Tru-Lock	Locking device for bracelets, watch bands, etc.	Flex-Let Expansion Products: Philadelphia, Dallas, Los Angeles, Montreal
Looplock	Toilet covers, bath-mats, rugs	Sanford Mills
Seam Lock	Woven pile carpet	Milton Newman
Quick Lox	Metal drums having removable heads and closure fasteners for such drums	Stevens Metal Co.
Lok-Screw	Two-part threaded blind rivets	The Dill Manufacturing Co.
Locklath	Plaster boards and plaster wall boards	Plastoid Products, Inc.
Loc Lip	Ceramic products having interlocking joints	Ric-Wil Co.
Lock Joint	Track brackets and track for sliding	Richards-Wilcox Co.
Lock Link	Chains	American Chain Co. Inc
Locknob	Lamp chimneys	R. E. Dietz Co.
Lockon	Track contacts for electric toy trains	The Lionel Corporation
Lock-Air	Anti-leak filler for inner tubes for tires	Lock Co., Inc. Mineola, N.Y.

29. That the word "lock," and various misspellings thereof, such as "lok," is such widespread and common use as a part of trademarks in the United States, on various locking and locked devices, including rings and other goods of the same descriptive properties, by so many persons that said word "lock," or misspellings thereof, such as "lok," has no trademark significance and plaintiff can have no exclusive rights in such part of its alleged trademarks "Wedlock" and "Wed Lok" which could be infringed by defendants' use of "Feature Lock."

30. That aside from the common and descriptive word "lock" appearing on both plaintiff's and defendants' marks, there is no similarity between such marks and no likelihood of confusion, and defendants therefore do not infringe any right of plaintiff, nor compete unfairly with plaintiff.

For a Fourth, Separate and Complete Affirmative Defense to the Complaints Herein, Defendants Allege:

31. That Strauss & Strauss, a corporation, one of plaintiff's predecessors in interest in and registrant of trade mark registration No. 185,365 on "Wedlock," set forth in paragraph IV of the complaints herein, first applied for registration of this mark for finger rings under the Trade Mark Act of 1905, application serial No. 176,050; that the United States Patent Office rejected said applica-

tion under the 1905 Act, holding said mark to be descriptive; that Strauss & Strauss did not appeal from this ruling but acceded to it and modified said application serial No. 176,050 to seek registration under the Trade Mark Act of 1920, which permitted the registration of descriptive marks, and that the United States Patent Office granted trademark registration No. 185,365 on said application serial No. 176,050 under the Trade Mark Act of 1920.

32. That plaintiff, registrant of trademark registration No. 430,436 on "Wed Lok," set forth in paragraph V of the complaints herein, first applied for registration of this mark on finger rings under the Trade Mark Act of 1905, application serial No. 474,122; that the United States Patent Office rejected said application, holding said mark to be descriptive; that plaintiff did not appeal from this ruling but acceded to it and modified its application serial No. 474,122 to seek registration under the Trade Mark Act of 1920, which permitted the registration of descriptive marks, and that the United States Patent Office granted trademark registration No. 430,436 on application serial No. 474,122 under the Trade Mark Act of 1920.

33. That plaintiff is now estopped from claiming that said marks "Wedlock" and "Wed Lok" are not descriptive because plaintiff and its predecessor in interest acquiesced in the United States Patent Office ruling holding such marks to be descriptive as stated in paragraphs 31 and 32 herein.

34. That no secondary meaning indicative of plaintiff or of plaintiff's predecessor, Strauss & Strauss, can have become attached to said marks "Wedlock" and "Wed Lok," at least as far as the descriptive words "lock" and "lok" are concerned, because of the use of such words by others in their marks as set forth in paragraphs 25 and 28 hereof, and therefore defendants have not infringed upon any right of plaintiff in using their mark "Feature Lock," nor competed unfairly with plaintiff.

Counterclaim by Defendants Feature Ring Co., Inc., S. Herbert Friend and Leonard V. Bloch

35. Defendant Feature Ring Co., Inc., alleges that it is a corporation duly organized and existing under and by virtue of the laws of the State of New York, and is a citizen of the State of New York, with a place of business in the City and County of New York, State of New York.

36. Defendant S. Herbert Friend and Leonard V. Bloch allege that they are residents of the City and County of San Francisco, State of California, and that they are copartners, S. Herbert Friend being a general partner, and Leonard V. Bloch a limited partner, doing business under the firm name and style of S. H. Friend, with a place of business in the City and County of San Francisco, State of California.

37. Defendants allege on information and belief that the plaintiff Granat Bros. is a corporation duly

organized and existing under the laws of the State of California, and is a citizen of the State of California, with a place of business in the City and County of San Francisco, State of California.

38. Defendants allege that this court has jurisdiction of this counterclaim, jurisdiction being founded upon the diversity of citizenship of the parties as alleged in paragraphs 35 and 37 hereof, and upon the fact that the matter in controversy exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars ($3,000).

39. Defendant Feature Ring Co., Inc., alleges that it is in the business of manufacturing and selling ring mountings or blanks, which business averages per year over $1,500,000 in retail value, that it began the manufacture and sale of sets of interlocking wedding and engagement ring mountings or blanks under the trade mark "Feature Lock" in or about April, 1948, and that the retail sale value of its interlocking ring mountings or blanks sold under such trade mark to date is over $850,000.

40. Defendants S. Herbert Friend and Leonard V. Bloch allege that they are in the business of manufacturing and selling at wholesale wedding and engagement rings including sets of interlocking wedding and engagement rings under the trademark "Feature Lock" manufactured with ring mountings or blanks made and sold by defendant Feature Ring Co., Inc.

41. Defendants allege on information and belief

that plaintiff is in the business of manufacturing and selling sets of interlocking wedding and engagement rings under the alleged trademark "Wed-Lok," and claims ownership of trademark registrations No. 430,436, issued by the United States Patent Office on June 10, 1947, under the Trade Mark Act of 1920 for the alleged trade mark "Wed Lok" and No. 185,365, issued by the United States Patent Office on June 10, 1924, under the Trade Mark Act of 1920 for the alleged trade mark "Wedlock."

42. Defendants allege on information and belief that despite the descriptiveness of plaintiff's alleged marks "Wed Lok" and "Wedlock," and particularly the descriptiveness of the words "lock" and "lok," when applied to interlocking rings or ring mountings, and despite the absence of any rights in plaintiff to the exclusive use of such words "lock" and "lok," all of which plaintiff well knows, plaintiff has, nevertheless, embarked on a campaign to unfairly monopolize said descriptive words "lock" and "lok" when applied to interlocking rings or ring mountings and to prevent proper public use of said descriptive words, as is evidenced by plaintiff's circulars issued to the jewelry trade, and letters written to jewelers charging that their use of any trade mark or trade name ending in "lock" or "lok" on interlocking rings and ring mountings constitutes infringement of plaintiff's alleged rights in said words "Wed Lok" and "Wedlock" and

unfair competition with plaintiff, and threatening suit therefor.

43. Defendants allege on information and belief that, as a part of said campaign to unfairly monopolize the descriptive words "lock" and "lok" on interlocking ring mountings and rings, plaintiff, well knowing its alleged trade marks "Wed Lok" and "Wedlock," and the said registrations thereof, were invalid or were not infringed by defendants' use of "Feature Lock" on their goods, and such use by those in privity with defendants, for the reasons set forth in paragraphs 22 through 34, inclusive, hereof, and well knowing that defendants and those in privity with defendants did not compete unfairly with plaintiff in such use, nevertheless, deliberately and with the intention of harassing and injuring defendants in their business, circularized the jewelry trade in general that the sale or advertisement of defendants' ring mountings or rings under defendants' mark "Feature Lock" would infringe plaintiff's rights in said alleged marks "Wed Lok" and "Wedlock," and would constitute unfair competition with plaintiff. Plaintiff further made unwarranted claims and threats against the customers of defendants and those in privity with them, charging them with unfair competition and with infringing plaintiff's alleged trade marks "Wed Lok" and "Wedlock," and threatening said customers and those in privity with them and said defendants' potential customers with suit if they sold or advertised said defendants' ring mountings or rings under said defendants' mark "Feature Lock."

44. Defendants allege that plaintiff's harassment of defendants' customers and those in privity with them and said defendants' potential customers constitutes an unfair and unwarrantable attempt by plaintiff to restrain defendants from doing that which they have a complete and lawful right to do and interferes with and obstructs the sale of the products of said defendants, and that the effect of plaintiff's unwarranted claims and threats is to retard and injure said defendants in the proper conduct of their business all to the great loss and damage of said defendants.

45. Defendants allege that as a result of plaintiff's unfair competition said defendants have been injured in their good will, and have been put to great expense in time and money to reassure their customers, those in privity with them and their potential customers that they would hold them harmless, and that despite such assurances defendants have lost orders for their interlocking ring mountings or rings which they would have received, and have failed to make sales of said interlocking ring mountings or rings which they would otherwise have made but for plaintiff's threats and harassment of said defendants' customers, those in privity with them and their potential customers.

46. Defendants allege that the acts of plaintiff herein complained of having caused damage to each of defendants' business in an amount that cannot at this time be determined, but said defendants are

informed and believe and, on information and belief, allege that said damage to each of them has been in excess of Three Thousand Dollars ($3,000).

47. Defendants allege on information and belief, that plaintiff has derived unlawful gains and profits from said acts of unfair competition, which gains and profits defendants would otherwise have received but for such unfair competition by plaintiff.

48. Defendants allege, on information and belief, that unless restrained by this Court plaintiff will continue such acts of unfair competition, all to the irreparable injury of said defendants.

49. Defendants allege that they have no other speedy and adequate remedy save by this counterclaim for damages.

Wherefore defendants and each of them deny that plaintiff is entitled to any relief whatsoever and pray:

1. That the trademarks "Wed Lok" and "Wedlock" and the registrations thereof No. 185,365 and No. 430,436 be adjudged to be invalid and void and that defendants, and each of them, be adjudged not to infringe the same;

2. That it be adjudged that in their manufacture and sale of interlocking ring mountings or rings under the mark "Feature Lock," defendants and each of them have not manufactured or sold ring mountings or rings under a mark confusingly similar to plaintiff's marks or liable to deceive the

public, or to have in any way infringed any rights of plaintiff or to have competed unfairly with plaintiff;

3. That an injunction be issued perpetually enjoining and restraining plaintiff and anyone in privity with plaintiff from harassing these defendants, their agents, vendees, or others in privity with them, with notices of infringement or threats to sue for infringement of plaintiff's alleged trade marks "Wed Lok" and "Wedlock," or with notices of unfair competition or threats to sue for unfair competition, for circularizing the jewelry trade with similar notices and threats, and from otherwise competing unfairly with said defendants;

4. That plaintiff be required to account to defendants Feature Ring Co., Inc., S. Herbert Friend, and Leonard V. Bloch for all profits realized by it from such unfair competition and for all damages sustained by said defendants on account thereof and that said damages be trebled;

5. That the complaints herein be dismissed with costs to the defendants; and

6. That the Court may grant to defendants such other and further relief as in equity shall be just.

/s/ JAS. M. NAYLOR,
NAYLOR and LASSAGNE.

/s/ JOHN VAUGHAN GRONER,

/s/ WILLIAM F. MOSS.

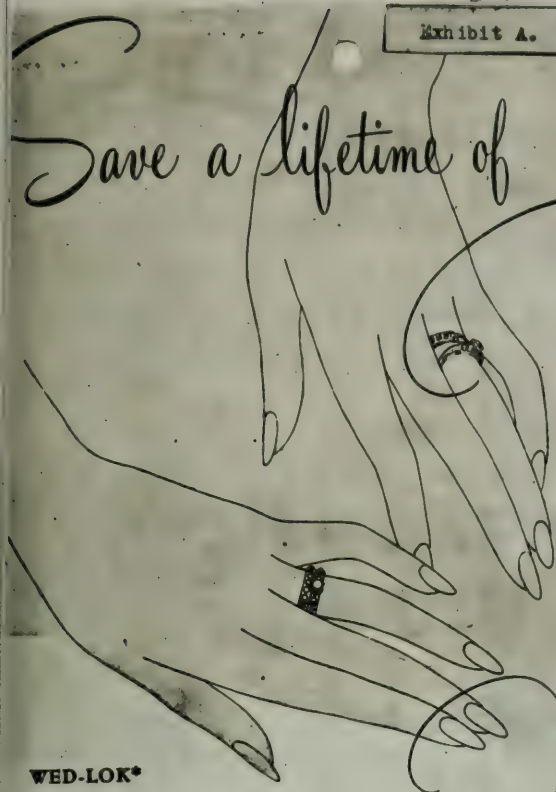
Receipt of copy acknowledged.

Exhibit A.

A[illegible]en in June 1st

VOGUE

Save a lifetime of Ring-worry



Other Diamond Rings... **can constantly bother you by turning and separating on your finger, losing the full beauty of both the rings and the diamonds.**

Wed-Lok*

WED-LOK* ENSEMBLES are locked together when worn together, yet will unlock instantly. These patented rings save ring-worry and ring-wear as they cannot slip out of position or rub against each other.



Diamond solitaire with 2 side diamonds. Wedding ring with 4 diamonds. Granat 14K Tempered Gold mountings.*

The Set... 250.00



Diamond solitaire with 4 side diamonds. Wedding ring with 6 diamonds. Granat Tempered Platinum mountings.*

The Set... 500.00



Diamond solitaire wi[illegible] baguette diamonds. W[illegible] ding ring with 2 round[illegible] 2 baguettes. Granat T[illegible] pered Platinum mounti[illegible]*

The Set... 75[illegible]

[illegible]e most important rings you'll ever own! Diamonds exactingly [illegible]ected for uniformity, color, and brilliance... set in exclusive [illegible]anat *Tempered** *Mountings* (not cast) of platinum or gold, to [illegible]ure protection of those fine diamonds throughout the years. [illegible]d-Lok Diamond Ensembles in many styles from 125.00 to [illegible]00.00 the set (taxes additional). See Wed-Lok rings at a fine [illegible]veler near you, or write Granat, San Francisco 10, California.

GRANAT

Any and all infringements of Granat Bros patents, trademarks, or copyrights will be prosecuted to the fullest extent of the law.

Trademark Reg. U.S. Pat. Off. Wed-Lok Ensembles Are Protected by U.S. Patents Issued and Pending

Ring Illustrations enlarged to show detail.

Endorsed: Filed October 15, 1948.

Ex. A

[Title of District Court and Causes.]

REPLY TO DEFENDANTS' COUNTERCLAIM

Comes Now Granat Bros., plaintiff above named, and in reply to the counterclaim by defendants Feature Ring Co., Inc., S. Herbert Friend and Leonard V. Bloch, admit, deny and allege as follows, to wit:

I.

Answering Paragraph numbered 35 of the counterclaim, plaintiff alleges that it is without knowledge as to the matters therein alleged, and on that ground denies the same.

II.

Answering Paragraph numbered 36 in the counterclaim, plaintiff admits that S. Herbert Friend and Leonard V. Bloch are residents of the City and County of San Francisco, State of California, and that they are copartners doing business under the firm name and style of S. H. Friend, with a place of business in the City and County of San Francisco, State of California, but it is without knowledge that S. Herbert Friend is a general partner and Leonard V. Bloch a limited partner in said business, and on that ground denies such allegations.

III.

Answering Paragraph numbered 37 of the counterclaim, plaintiff admits the allegations thereof.

IV.

Answering Paragraph numbered 38 of the counterclaim, plaintiff admits the allegations thereof.

V.

Answering Paragraph numbered 39 of the counterclaim, plaintiff denies each and every of the allegations there contained.

VI.

Answering Paragraph numbered 40 of the counterclaim, plaintiff admits that the defendants S. Herbert Friend and Leonard V. Bloch are in the business of selling sets of interlocking wedding and engagement rings under the trade-mark "Feature Lock," but except for such admission both generally and specifically denies each and every other allegation in said Paragraph numbered 40 of the counterclaim contained.

VII.

Answering Paragraph numbered 41 of the counterclaim, plaintiff admits that it is in the business of manufacturing and selling sets of interlocking wedding and engagement rings under its trade-marks "Wed-Lok" and "Wedlock," and is the owner of trade-mark registrations Nos. 430,436 and 185,365, issued by the United States Patent Office for said trade-marks "Wed-Lok" and "Wedlock."

VIII.

Answering Paragraph numbered 42 of the coun-

terclaim, plaintiff both generally and specifically denies each and every allegation therein contained.

IX.

Answering Paragraph numbered 43 of the counterclaim, plaintiff both generally and specifically denies each and every allegation therein contained.

X.

Answering Paragraph numbered 44 of the counterclaim, plaintiff both generally and specifically denies each and every allegation therein contained.

XI.

Answering Paragraph numbered 45 of the counterclaim, plaintiff both generally and specifically denies each and every allegation therein contained.

XII.

Answering Paragraph numbered 46 of the counterclaim, plaintiff both generally and specifically denies each and every allegation therein contained.

XIII.

Answering Paragraph numbered 47 of the counterclaim, plaintiff both generally and specifically denies each and every allegation therein contained.

XIV.

Answering Paragraph numbered 48 of the counterclaim, plaintiff both generally and specifically denies each and every allegation therein contained.

XV.

Answering Paragraph numbered 49 of the counterclaim, plaintiff both generally and specifically denies each and every allegation therein contained.

Wherefore plaintiff prays that defendants take nothing by the counterclaim and that the same be dismissed with costs to the plaintiff, and that the Court may grant such other and further relief as in equity may be just.

MELLIN AND HANSCOM,
By /s/ OSCAR A. MELLIN,
Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed November 12, 1948.

[Title of District Court and Causes.]

ORDER

I shall find:

1. The word "Wed-Lok" is not primarily descriptive of the ensembles marketed and sold by plaintiff, but it is used in a suggestive or figurative sense. As such it is a valid registered trade-mark.

2. That the trade-mark was not abandoned.

3. The words "Feature Lock" are sufficiently distinct from "Wed-Lok" as to preclude likelihood that Feature Ring Co.'s product will be passed off as those of plaintiff. The evidence fails to show

confusion in the ultimate customers. Neither infringement nor unfair competition is established by the weight of the evidence.

4. The notices sent by plaintiff to customers of defendant Feature Ring Co. were sent in good faith and suit was brought by plaintiff seasonably after sending the notices. Feature Ring Co.'s counterclaim is therefore not established.

Judgment will be for defendants upon plaintiff's complaint and for plaintiff upon the counterclaim. Findings of fact and conclusions of law to be prepared by plaintiff pursuant to local rule; each party to bear its own costs.

Dated July 8th, 1949.

/s/ DAL M. LEMMON,
U. S. District Judge.

[Endorsed]: Filed July 8, 1949.

[Title of District Court and Causes.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to Rule 52 of the Federal Rules of Civil Procedure and Rule 5(e) of the Rules of Practice of the District Court of the United States for the Northern District of California, the Court makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

I.

That plaintiff, Granat Bros., is a corporation duly organized and existing under and by virtue of the laws of the State of California, and has a place of business in the City and County of San Francisco, State of California.

II.

That the defendants, S. Herbert Friend and Leonard V. Bloch, are residents of the City and County of San Francisco, State of California, and are co-partners. S. Herbert Friend being a general partner and Leonard V. Bloch a limited partner, and that they are doing business under the firm name and style of S. H. Friend with a place of business in the City and County of San Francisco, State of California.

III.

That the intervening defendant, Feature Ring Co., is a corporation duly organized and existing under and by virtue of the laws of the State of New York, and has a place of business in the City of New York, State of New York.

IV.

That plaintiff is the owner of all of the right, title and interest in and to the trade-mark "Wed-Lok" and that plaintiff registered the trade-mark "Wed-Lok" in the United States Patent Office for finger rings, said registration bearing No. 430436, dated June 10, 1947.

V.

That plaintiff adopted the trade-mark "Wed-Lok" for wedding ensembles in the year 1934 and commenced to use the same at that time.

VI.

That plaintiff applied the trade-mark "Wed-Lok" to finger rings and wedding ensembles and said finger rings and wedding ring ensembles were sold in interstate commerce over the entire United States by plaintiff continuously since at least the year 1936.

VII.

That plaintiff has never abandoned the trade-mark "Wed-Lok."

VIII.

Plaintiff's trade-mark "Wed-Lok" is not primarily descriptive of the ring ensembles marketed and sold by plaintiff, but it is used in a suggestive or figurative sense and is a valid registered trade-mark.

IX.

That plaintiff has been the exclusive user of the trade-mark "Wed-Lok" continuously since at least the year 1936.

X.

That plaintiff made extensive sales of its products trade-marked "Wed-Lok" throughout the entire United States from the year 1934 to date, and such sales in the trade-marked products were in the

amount of approximately Three Million Dollars ($3,000,000.00).

XI.

That plaintiff's trade-marked products, "Wed-Lok" and the trade-mark "Wed-Lok" have been widely and very extensively advertised throughout the United States from the year 1934 to the present, excluding the war years of 1942, 1943, 1944 and 1945; and such advertising, exclusive of extensive dealer advertising, cost approximately One Hundred Fifty Three Thousand Dollars ($153,000.00).

XII.

That in addition to plaintiff's advertising of trade-mark products "Wed-Lok" plaintiff's dealers throughout the United States extensively advertised them in local papers.

XIII.

That the words "Feature Lock" are sufficiently distinct from "Wed-Lok" as to preclude likelihood that the Feature Ring Co.'s product will be passed off as those of plaintiff.

XIV.

The evidence fails to show confusion in the ultimate customers between the products marked "Feature Lock" and plaintiff's products marked "Wed-Lok," and neither trade-mark infringement nor unfair competition is established.

XV.

That the notices sent by plaintiff to customers of defendant, Feature Ring Co., were sent in good faith and suit was brought by plaintiff seasonably after sending the notices.

XVI.

That the evidence establishes that plaintiff did not unfairly compete with the Feature Ring Co.

Conclusions of Law

I.

That plaintiff is the owner of the trade-mark "Wed-Lok" as applied to wedding ring ensembles.

II.

That the trade-mark "Wed-Lok" is a distinctive and valid trade-mark.

III.

That plaintiff is the owner of Trade-Mark Registration No. 430,436, dated June 10, 1947, and said registration is good and valid in law.

IV.

That this Court has jurisdiction of this cause in that the same is founded upon the trade-mark laws of the United States.

V.

That no confusion was shown between the ultimate customers of plaintiff and defendants and therefore

plaintiff failed to establish trade-mark or unfair competition by defendants.

VI.

That the trade-mark "Feature Lock" does not infringe upon the trade-mark "Wed-Lok."

VII.

That the defendants have not unfairly competed with the plaintiff.

VIII.

That the plaintiff has not unfairly competed with the defendant, Feature Ring Co.

IX.

That no damages were proved by any of the parties hereto.

X.

That each party shall bear its own costs.

/s/ DAL M. LEMMON,
Judge of the District Court.

Receipt of copy acknowledged.

Lodged September 8, 1949.

[Endorsed]: Filed September 14, 1949.

In the United States District Court, Northern District of California, Southern Division

Civil Action No. 28219-H

GRANAT BROS., a corporation,

Plaintiff,

vs.

SAMUEL H. FRIEND, S. HERBERT FRIEND and LEONARD V. BLOCH, copartners doing business under the firm name and style of S. H. Friend,

Defendants,

and

FEATURE RING CO., INC.,

Intervening Defendant.

JUDGMENT

This cause having come on to be heard upon the issues raised by the Complaint, Consolidated Answer and Counterclaim and Reply to Defendants' Counterclaim, and the Court having filed its Findings of Fact and Conclusions of Law, it is ordered, adjudged and decreed:

I.

That plaintiff, Granat Bros., is a corporation duly organized and existing under and by virtue of the laws of the State of California, and has a place of

business in the City and County of San Francisco, State of California.

II.

That the defendants, S. Herbert Friend and Leonard V. Bloch, are residents of the City and County of San Francisco, State of California, and are copartners. S. Herbert Friend being a general partner and Leonard V. Bloch a limited partner, and that they are doing business under the firm name and style of S. H. Friend with a place of business in the City and County of San Francisco, State of California.

III.

That the intervening defendant, Feature Ring Co., is a corporation duly organized and existing under and by virtue of the laws of the State of New York, and has a place of business in the City of New York, State of New York.

IV.

That this Court has jurisdiction of this cause in that the same is founded upon the trade-mark laws of the United States.

V.

That plaintiff is the owner of all of the right, title and interest in and to the trade-mark "Wed-Lok" and that plaintiff registered the trade-mark "Wed-Lok" in the United States Patent Office for

finger rings, said registration bearing No. 430,436, dated June 10, 1947.

VI.

That plaintiff's trade-mark "Wed-Lok" is a distinctive and valid trade-mark.

VII.

That defendants in using the trade-mark "Feature Lock" have not infringed upon plaintiff's trade-mark "Wed-Lok."

VIII.

That defendants have not unfairly competed with plaintiff.

IX.

That plaintiff has not unfairly competed with defendants, Feature Ring Co., Inc., S. Herbert Friend or Leonard V. Bloch.

X.

That the complaint of plaintiff herein be and the same is hereby dismissed as to defendants.

XI.

That the counterclaim of defendants, Feature Ring Co., Inc., S. Herbert Friend and Leonard V. Bloch be and the same is hereby dismissed as to plaintiff.

XII.

That no damages are to be awarded to any of the parties.

XIII.

That each party bear its own costs.

/s/ DAL M. LEMMON,
U. S. District Judge.

Receipt of copy acknowledged.

Lodged September 8, 1949.

[Endorsed]: Filed September 14, 1949.

Entered in Civil Docket September 15, 1949.

[Title of District Court and Causes.]

NOTICE OF APPEAL TO UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT UNDER RULE 73(b)

Notice is hereby given that Samuel H. Friend, S. Herbert Friend, Leonard V. Bloch, and Feature Ring Co., Inc., defendants above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit, from the parts of the judgment entered in this action on September 15, 1949, which adjudge as follows:

"VI. That plaintiff's trade-mark 'Wed-Lok' is a distinctive and valid trade-mark.

IX. That plaintiff has not unfairly competed with defendants, Feature Ring Co., Inc., S. Herbert Friend or Leonard V. Bloch.

XI. That the counterclaim of defendants, Fea-

ture Ring Co., Inc., S. Herbert Friend and Leonard V. Bloch be and the same is hereby dismissed as to plaintiff."

XII. In so far as it fails to award damages to defendants herein on their counterclaim.

XIII. In so far as it fails to award defendants their costs herein.

Dated: October 15, 1949.

NAYLOR and LASSAGNE,
JAS. M. NAYLOR,
JOHN VAUGHAN GRONER,

By /s/ JAS. M. NAYLOR,
Attorneys for Defendants.

[Endorsed]: Filed October 15, 1949.

[Title of District Court and Causes.]

NOTICE OF APPEAL

Notice Is Hereby Given that Granat Bros., the Plaintiff above named, hereby appeals to the Court of Appeals for the Ninth Circuit from the following parts, and each thereof, of the judgment entered in this action on the 15th day of September, 1949:

(a) Paragraph numbered VII of said judgment;

(b) Paragraph numbered VIII of said judgment.

Dated: At San Francisco, California, this 14th day of October, 1949.

MELLIN AND HANSCOM,

By /s/ OSCAR T. MELLIN,
Attorneys for Plaintiff.

[Endorsed]: Filed Oct. 15, 1949.

[Title of District Court and Causes.]

BOND ON APPEAL

Know All Men by These Presents, That we, Granat Bros., a corporation, as Principal, and Indemnity Insurance Company of North America, a corporation, as Surety, are held and firmly bound unto Samuel H. Friend, S. Herbert Friend and Leonard V. Bloch, copartners doing business under the firm name and style of S. H. Friend, Defendants, and Feature Ring Co., Inc., Intervening Defendant above named, in the full and just sum of Two Hundred Fifty and No/100 Dollars ($250.00) to be paid to the said Samuel H. Friend, S. Herbert Friend and Leonard V. Bloch, copartners doing business under the firm name and style of S. H. Friend, Defendants, and Feature Ring Co., Inc., Intervening Defendant, or their successors or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 14th day of October, 1949.

Whereas, lately, in the District Court of the United States for the Northern District of California, Southern Division, in a suit depending in said Court between Granat Bros., a corporation, Plaintiff and Samuel H. Friend, S. Herbert Friend and Leonard V. Bloch, copartners doing business under the firm name and style of S. H. Friend, Defendants, and Feature Ring Co., Inc., Intervening Defendant, a judgment was rendered against the Plaintiff and said Plaintiff has duly filed notice of appeal from said judgment:

Now, Therefore, the condition of the above obligation is such that if the said Plaintiff shall prosecute its appeal with the effect and pay all costs if the appeal is dismissed, or the judgment affirmed, or such costs as the appellate court may award if the judgment is modified, then the above obligation to be void; otherwise, to remain in full force and virtue.

GRANAT BROS.,
A Corporation,
Principal.
INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,

[Seal] By /s/ JAMES A. SMITH,
Attorney-in-Fact.

Bond No. .....

State of California,
San Francisco,
County of San Francisco—ss.

On this 14th day of October in the year one thousand nine hundred and forty-nine before me, Fred G. Ainslie, a Notary Public in and for the City and County of San Francisco, personally appeared James A. Smith known to me to be the person whose name is subscribed to the within instrument as the Attorney-in-fact of the Indemnity Insurance Company of North America, and acknowledged to me that he subscribed the name of the Indemnity Insurance Company of North America thereto as principal, and his own name, as Attorney-in-fact.

[Seal]: /s/ FRED G. AINSLIE,
Notary Public in and for the City and County of San Francisco, State of California.

My Commission Expires August 27, 1951.

[Endorsed]: Filed October 15, 1949.

[Title of District Court and Causes.]

CONCISE STATEMENT OF THE POINTS ON WHICH PLAINTIFF-APPELLANT INTENDS TO RELY ON APPEAL

Comes now plaintiff-appellant, above-named, and makes the following concise statement of the points on which it intends to rely for appeal to the United

States Court of Appeals for the Ninth Circuit from the Judgment entered September 15, 1949, in the above-entitled cause.

1.

The Court erred in finding that the defendants in using the trade-mark "Feature Lock" did not infringe upon plaintiff's trade-mark "Wed-Lok."

2.

The Court erred in not finding that the defendants in using the trade-mark "Feature Lock" infringed upon plaintiff's trade-mark "Wed-Lok."

3.

The Court erred in finding that defendants have not unfairly competed with plaintiff.

4.

The Court erred in not finding that defendants have unfairly competed with plaintiff.

5.

The Court erred in not finding that plaintiff's trade-mark had acquired a secondary meaning identifying the goods of plaintiff and its goods alone.

6.

The Court erred in finding that the words "Feature Lock" are sufficiently distinct from the words "Wed-Lok" as to preclude the likelihood

that Feature Ring Co., Inc.'s products will be passed off as those of plaintiff's.

7.

The Court erred in not finding that the words "Feature Lock" are not sufficiently distinct from the words "Wed-Lok" as to preclude the likelihood that Feature Ring Co., Inc.'s products will be passed off as those of plaintiff's.

8.

The Court erred in concluding that it was necessary to show confusion between customers of plaintiff and defendants before plaintiff could establish trade-mark infringement by defendants.

9.

The Court erred in not concluding that it was not necessary to show confusion between customers of plaintiff and defendants before plaintiff could establish trade-mark infringement by defendants.

10.

The Court erred in concluding that it was necessary to show confusion between customers of plaintiff and defendants before plaintiff could establish unfair competition by defendants.

11.

The Court erred in not concluding that it was not necessary to show confusion between customers

of plaintiff and defendants before plaintiff could establish unfair competition by defendants.

MELLIN AND HANSCOM,

By /s/ OSCAR A. MELLIN,

/s/ LeROY HANSCOM,

/s/ JACK E. HURSH,

Attorneys for Plaintiff-Appellant.

Proof of Service

I hereby certify that a copy of the foregoing Concise Statement of the Points on Which Plaintiff-Appellant Intends To Rely on Appeal has this day been mailed to Messrs. Naylor & Lassagne, 2607 Russ Building, San Francisco 4, California, attorneys for defendants.

/s/ OSCAR A. MELLIN.

San Francisco, California, November 18, 1949.

[Endorsed]: Filed November 19, 1949.

[Title of District Court and Causes.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Comes now plaintiff-appellant, above-named, and pursuant to Rule 75 of the Federal Rules of Civil Procedure designates the following portions of the

record, proceedings, and evidence to be contained in the record on appeal:

1. Complaint.

2. Stipulated intervention of Feature Ring Co., Inc., as defendants.

3. Consolidated Answer and Counterclaim.

4. Reply to Defendants' Counterclaim.

5. Stipulation consolidating cases for trial.

6. Order, dated July 8, 1949.

7. Findings of Fact and Conclusions of Law.

8. Judgment.

9. The following portions of the Reporter's transcript of proceedings and testimony taken on March 15, 16 and 17, 1949, are herewith designated to be contained in the record on appeal:

Page 4, lines 4 and 5, incl.; page 4, line 12 to page 27, line 4, incl.; page 29, line 7 to page 34, line 12, incl.; page 34, line 23 to page 56, line 4, incl.; page 56, line 13, to page 57, line 4, incl.; page 57, line 20, to page 59, line 2, incl.; page 60, line 24, to page 63, line 10, incl.; page 65, line 8, to page 72, line 4, incl.; page 72, lines 6 and 7, incl.; page 72, line 14, to page 84, line 14, incl.; page 84, lines 22 and 23, incl.; page 85, line 1 to page 92, line 6, incl.; page 92, line 12 to page 110, line 7, incl.; page 110, line 17 to page 114, line 5, incl.; page 114, line 8 to page 115, line 2, incl.; page 115,

line 20 to page 118, line 15, incl.; page 118, line 25 to page 145a, line 1, incl.; page 146, line 10, to page 176, line 4, incl.; page 178, line 3; page 178, line 7; page 178, line 19 to page 179, line 24, incl.; page 180, line 10 to page 181, line 4, incl.; page 181, line 13 to page 182, line 2, incl.; page 182, line 7 to page 191, line 16, incl.; page 191, line 21 to page 198, line 5, incl.; page 198, line 19, to page 203, line 19, incl.; page 204, line 3 to page 205, line 25, incl.; page 206, line 3 to page 208, line 12, incl.; page 208, line 19 to page 210, line 9, incl.; page 214, lines 11 to 15, incl.; page 218, lines 17 to 23, incl.; page 219, line 16 to page 223, line 8, incl.; page 223, line 24 to page 224, line 21, incl.; page 266, lines 7 and 8, incl.; page 274, line 20 to page 276, line 16, incl.; page 279, line 3 to page 280, line 8, incl.; page 283, lines 2 to 10, incl.; page 291, line 24 to page 301, line 11, incl.; page 316, line 1 to page 318, line 9, incl.; page 318, line 22 to page 320, line 19, incl.; page 322, lines 1 to 24, incl.; page 323, line 1 to page 338, line 20, incl.; page 341, line 20; page 342, line 13 to page 352, line 5, incl.

10. Plaintiff's Exhibits A to RRR, inclusive.

11. Defendants' Exhibits 1 to 6, inclusive.

12. Notice of Appeal.

13. Bond on Appeal.

14. Concise Statement of Points on which Plaintiff-Appellant Intends To Rely on Appeal.

15. This Designation of Contents of Record on Appeal.

MELLIN AND HANSCOM,

By /s/ OSCAR A. MELLIN,

/s/ LeROY HANSCOM,

/s/ JACK E. HURSH,

Attorneys for Plaintiff-Appellant.

San Francisco, California, November 18, 1949.

Proof of service attached.

[Endorsed]: Filed Nov. 19, 1949.

[Title of District Court and Causes.]

DEFENDANTS' DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Come now defendants-appellees and cross-appellants, above named, pursuant to Rule 75 of Federal Rules of Civil Procedure, and designate the following portions of the record, proceedings and evidence to be contained in the record on appeal:

1. Request for Admissions Under Rule 36.

2. Plaintiff's Admissions and Denials in Response to Defendants' Request for Admissions Under Rule 36.

3. The following portions of the Reporter's Transcript of proceedings and testimony taken on March 15th, 16th and 17th, 1949, are herewith designated to be contained in the record on appeal:

Page 27, line 5 to end of page; page 28, the whole page; page 29, lines 1 to 6, incl.; page 34, lines 13 to 22, incl.; page 110, lines 8 to 15, incl.; page 118, lines 16 to 24, incl.; page 198, lines 6 to 12, 13-18, incl.; page 203, line 20 to end of page; page 204, lines 1 and 2; page 211, line 3, to page 214, line 10, incl.; page 214, lines 17 and 18; page 214, line 23; page 223, lines 9 to 23, incl.; page 224, lines 22 to 25, incl.; page 225, the whole page; page 226, lines 1 to 19, incl.; page 226, lines 24 and 25; page 227, line 1 to page 241, line 14, incl.; page 242, line 7 to page 266, line 6, incl.; page 266, line 9 to page 274, line 19, incl.; 276, 25 to 277 line 23; page 278, lines 1 to 17, incl.; page 279, lines 1 and 2; page 280, line 9, to page 283, line 1, incl.; page 283, lines 11 to 25, incl.; page 284, line 1, to page 291, line 23, incl.; page 301, line 12, to page 315, line 25, incl.; page 318, line 10 to 21, incl.; page 320, line 20, to page 321, line 25, incl.; page 338, line 21, to page 341, line 19, incl.; page 341, line 21, to page 342, line 12, incl.; page 352, line 6, to page 353, line 10, incl.; page 361, line 11, to page 365, line 7, incl.

4. Defendants' Exhibits 7 to 37, inclusive; Defendants' 38 for Identification, and Defendants' Exhibits 39 and 40.

5. Defendants' Notice of Appeal.

6. Stipulation Relative to Filing of Bond on Appeal.

7. Bond on Appeal.

8. Stipulation and Order Extending Time for Docketing Appeal.

9. Defendants' Designation of Contents of Record on Appeal.

10. Concise Statement of Points on Which Defendants-Appellees and Cross-Appellants Intend to Rely on Appeal.

NAYLOR and LASSAGNE,
JAS. M. NAYLOR,
JOHN VAUGHAN GRONER,

By /s/ JAS. M. NAYLOR,
Attorneys for Defendants.

Certificate of Service attached.

[Endorsed]: Filed November 28, 1949.

[Title of District Court and Causes.]

PLAINTIFF'S COUNTER DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Comes now plaintiff-cross-appellee, above named, and designates the following additional portions of the record, proceedings and evidence to be contained in the record on appeal:

1. The following additional portions of the Reporter's Transcript of proceedings taken on March 15th, 16th and 17th, 1949, are herewith designated to be contained in the record on appeal.

Page 198, lines 13 to 18, incl.; page 276, line 25, to page 277, line 23, incl.

2. Exhibit SSS.

3. Plaintiff's Counter Designation of Contents of Record on Appeal.

MELLIN AND HANSCOM,

By /s/ JACK E. HURSH.

Receipt of Copy acknowledged.

[Endorsed]: Filed Nov. 29, 1949.

[Title of District Court and Causes.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court, or a true and correct copy of an order entered on the minutes of this Court, in the above-entitled case, and that they constitute the Record on Appeal herein, as designated by the Appellant, to wit:

Complaint for Trade-Mark Infringement and Unfair Competition.

Stipulation Consolidating Cases for Trial.

Minute Order of August 23, 1948—Consolidating Cases for Trial.

Stipulated Intervention of Feature Ring Co., Inc., as a Defendant.

Consolidated Answer.

Reply to Defendants' Counterclaim.

Order for Judgment.

Findings of Fact and Conclusions of Law.

Judgment.

Notice of Appeal to United States Court of Appeals by Defendants.

Notice of Appeal by Plaintiff.

Bond on Appeal by Plaintiff.

Concise Statement of the Points on Which Plaintiff-Appellant Intends to Rely on Appeal.

Designation of Contents of Record on Appeal by Plaintiff-Appellant.

Plaintiff's Exhibits Nos. A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, W, X, Y, Z, AA, BB, CC, DD, EE, FF, GG, HH, II, JJ, KK, LL, MM, NN, OO, PP, QQ, RR, SS, TT, UU, VV, WW, XX, YY, ZZ, A 3, B 3, C 3, D 3, E 3, F 3, G 3, H 3, I 3, J 3, K 3, L 3, M 3, N 3, O 3, P 3, Q 3, R 3, S 3, T 3, U 3, V 3, W 3, X 3, Y 3, Z 3 (includes Z A-D incl.), A O, and B 4.

Defendants' Exhibits Nos 1, 2, 3, 4, 5, and 6.

Reporter's Transcripts—Vol. 1—March 15, 1949, Vol. 2—March 16, 1949; Vol. 3—March 17, 1949.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 22nd day of November, A.D. 1949.

C. W. CALBREATH,
Clerk.

[Seal] By /s/ M. E. VAN BUREN,
Deputy Clerk.

[Endorsed]: No. 12407. United States Court of Appeals for the Ninth Circuit. Samuel H. Friend, S. Herbert Friend, Leonard V. Bloch, co-Partners Doing Business Under the Firm Name and Style of S. H. Friend, and Feature Ring Co., Inc., Appellants, vs. Granat Bros., a Corporation, Appellee, and Granat Bros., a Corporation, Appellant, Samuel H. Friend, S. Herbert Friend and Leonard V. Bloch, co-Partners Doing Business Under the Firm Name and Style of S. H. Friend and Feature Ring Co., Inc., Appellees. Transcript of Record. Appeals from the United States District Court for the Northern District of California, Southern Division.

Filed November 22, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States District Court, Northern District of California, Southern Division

Civil Action 28219-H

GRANAT BROS., a Corporation,

Plaintiff,

vs.

SAMUEL H. FRIEND, S. HERBERT FRIEND and LEONARD V. BLOCH, Co-Partners, Doing Business Under the Firm Name and Style of S. H. Friend,

Defendants.

Civil Action 28220-H

GRANAT BROS., a Corporation,

Plaintiff,

vs.

HERBERT BROWN, an Individual,

Defendant,

and

FEATURE RING CO., INC.,

Intervening Defendant.

REQUEST FOR ADMISSIONS UNDER RULE 36

Defendants, Samuel H. Friend, S. Herbert Friend and Leonard V. Bloch, co-partners, doing business under the firm name and style of S. H. Friend,

Herbert Brown and Feature Ring Co., Inc., request plaintiff, Granat Bros., to make the following admissions for the purposes of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

That each of the following statements is true:

(a) That with respect to the trade mark "Wedlock" and the registration thereof No. 185,365, dated June 10, 1924, plaintiff's claim of ownership is based upon the following chain of title:

(1) An alleged assignment, dated December 10, 1934, from Strauss & Strauss, a New Jersey corporation, to Norman L. Strauss and William L. Strauss, a copartnership.

(2) An alleged assignment, dated December 14 and 18, 1934, from Norman L. Strauss and William L. Strauss, co-partners, to Paul Finkelstein, Sylvan Levy and Lazare Kaplan, assignees for the benefit of creditors of Strauss & Strauss, a copartnership.

(3) An alleged assignment, dated December 31, 1934, January 4, 1935, and January 7, 1935, from Paul Finkelstein, Sylvan Levy and Lazare Kaplan, acting as creditors committee in liquidation of William L. Strauss and Norman L. Strauss to Norman L. Strauss.

(4) An alleged assignment, dated March 28, 1936, from Norman L. Strauss to Granat Bros., a California corporation.

(b) Each of the following trade marks were registered in the United States Patent Office on the dates, under the numbers, to the parties named and for the goods specified:

Mark	Reg. No. & Reg. Date	Goods	Owner
Wed-Luck	411,415 1/16/45	Jewelry: Rings, Lockets, Bracelets	S. & S. Mfg. Co., Providence, R.I.
Gemlock	357,056 5/24/38	Bracelet Attachments	Gemex Co., Newark, N.J.
Turnlock	378,374 6/4/40	Necklaces and Watch Bracelets	Gemex Co., Newark, N.J.
Dubl-Lock	355,462 3/15/38	Key rings	Forstner Chain Corp., Irvington, N.J.
Dubl-Lock	349,128 8/17/37	Watch bracelets	Jacques Kreisler Sales Corp., New York, N.Y.
Inter-Locking	328,054 9/10/35	Finger rings	Joseph Granat, San Francisco, Calif.
Nu-Lock	290,981 1/19/32	Personal jewelry, not including watches	Freeman-Daughaday Co., Providence, R.I.
Sta Lokt & design	Not yet issued, Pub. 6/8/48	Cuff buttons	J. F. Sturday's Sons Co., Attleboro Falls, Mass.
Locked-In Love	432,290 8/26/47	Finger rings	Untermeyer, Robbins & Co., New York, N.Y.
Lokit & design	276,885 10/28/30	Belt buckles	A. Rosenberg & Co., Boston, Mass.
Wood-Lok	431,603 7/29/47	Resin and starch adhesives	National Starch Products, Inc., New York, N.Y.

Mark	Reg. No. & Reg. Date	Goods	Owner
Load-Lok	425,121 11/5/46	Resin and starch adhesives	National Starch Products, Inc., New York, N.Y.
Plastilock	415,176 7/31/45	Adhesive cements made from synthetic plastics	B. F. Goodrich Co. New York, N.Y. & Akron, Ohio
Wedgelock	405,967 2/29/44	Sliding closure fasteners for cosmetic bags, change purses, etc.	Corona Enterprises, Inc., New York, N.Y.
Vulcalock	234,182 10/18/27 Renewed	Adhesive cement	B. F. Goodrich Co. New York, N.Y.
Bondlok	428,651 4/1/47	Slide fasteners	Herman Snyder, d.b.a. Bondlok Products Co., New York, N.Y.
Gazlok	425,424 11/19/46	Anti-siphoning theft guards for gas tanks	Jafber Mfg. & Sales Co. Inc. to Wm. Jaffa, Minneapolis, Minn.
Dualock	425,372 11/12/46	Lock nuts	Easy Washing Machining Co., Ltd., Toronto, Can.
Adelock	418,693 1/8/46	Self locking nuts and fasteners	Adel Precision Products Corp., Burbank, Calif.
Nescolok	415,404 8/7/45	Machine screw and washer unit fasteners	New England Screw Co., Keene, N.H.
Gaplock & design	383,346 12/3/40	Adhesive friction tape	Garlock Packing Co., Palmyra, N.Y.
Grainlock	351,699 11/2/37	Polishing-wheel cement	Industrial Lubricants Co., Detroit, Mich.

Mark	Reg. No. & Reg. Date	Goods	Owner
Ce-Lok	348,294 7/20/37	Liquid cements for leather, metal, glass, etc.	Albert H. Mitchell, Bellerose, L.I., N.Y.
Inlock	318,284 10/23/34	Adhesive cement	Inland Mfg. Co., Dayton, Ohio
Ruglock & design	304,791 7/18/33	Latex sizing for backs of rugs, mats, etc.	American Curatex Corp., Quincy, Mass.
Hammer Lock	414,359 6/5/45	Pipe unions	Turbolite Co., Houston, Texas
Everlock	405,720 2/15/44	Bolts and other threaded elements	Thompson Bremer & Co., Chicago, Ill.
Laylock	404,506 11/30/43	Wire rope clamps	Bethlehem Steel Co., Bethlehem, Pa.
Maximlock	399,884 2/2/43	Box hinges	H. D. Greenman d.b.a. Maximlok Co., Brooklyn, N.Y.
Millok	395,491 5/26/42	Metal pipe fittings	C. Mueller, d.b.a. Mueller Spec. Mfg. Co., Chicago, Ill.
Valok	388,751 7/8/41	Brackets for venetian blinds	Lorentzen Hardware Mfg. Corp., New York, N.Y.
Ledilok	377,395 4/30/40	Expansion shields	U.S. Expansion Bolt Co., York, Pa.
Spiralok	374,723 1/23/40	Metal pipe fittings	Pacific Pipe Co. San Francisco, Calif.
Durolok	373,608 12/12/39	Slide operated fasteners	Standard Products Corp., New York, N.Y.

Mark	Reg. No. & Reg. Date	Goods	Owner
ine Lok : design	381,542 9/20/40	Clothes line holders, pulleys, blocks, etc.	F. W. Sauer, d.b.a. Fred W. Sauer Mfg. Co., Newark, N.J.
ix-Lock	384,909 2/4/41	Metal pipe and hose couplings	Dixon Valve & Coupling Co., Philadelphia, Pa.
peedlock	350,844 10/5/37	Hose fittings	Cleveland Brass Mfg. Co., Cleveland, Ohio
olox	279,518 1/20/31	Combined adhesive cement and solder	Plox Mfg. Co., Merriam, Kans.

(c) The following parties use the unregistered marks upon the goods hereinafter identified:

Mark	Goods	Owner
Mark	Goods	Owner
ife-Lok	Interlocking wedding and engagement rings	Manne & Son
nap-Lock	Clip device to hold wedding and engagement rings together	Royal Jewelry Stores, N.Y., N.J., Conn. and Pa.
lex-Let Tru•Lock : ru-Lock	Locking device for bracelets, watch bands, etc.	Flex-Let Expansion Products: Philadelphia, Dallas, Los Angeles, Montreal
ooplock	Toilet covers, bath-mats rugs	Sanford Mills
eam Lock	Woven pile carpet	Milton Newman
uick Lox	Metal drums having removable heads and closure fasteners for such drums	Stevens Metal Co.
ok-Screw	Two-part threaded blind rivets	The Dill Manufacturing Co.

Mark	Reg. No. & Reg. Date	Goods	Owner
Ce-Lok	348,294 7/20/37	Liquid cements for leather, metal, glass, etc.	Albert H. Mitchell, Bellerose, L.I., N.Y.
Inlock	318,284 10/23/34	Adhesive cement	Inland Mfg. Co., Dayton, Ohio
Ruglock & design	304,791 7/18/33	Latex sizing for backs of rugs, mats, etc.	American Curatex Corp., Quincy, Mass.
Hammer Lock	414,359 6/5/45	Pipe unions	Turbolite Co., Houston, Texas
Everlock	405,720 2/15/44	Bolts and other threaded elements	Thompson Bremer & Co., Chicago, Ill.
Laylock	404,506 11/30/43	Wire rope clamps	Bethlehem Steel Co., Bethlehem, Pa.
Maximlock	399,884 2/2/43	Box hinges	H. D. Greenman d.b.a. Maximlok Co., Brooklyn, N.Y.
Millok	395,491 5/26/42	Metal pipe fittings	C. Mueller, d.b.a. Mueller Spec. Mfg. Co., Chicago, Ill.
Valok	388,751 7/8/41	Brackets for venetian blinds	Lorentzen Hardware Mfg. Corp., New York, N.Y.
Ledilok	377,395 4/30/40	Expansion shields	U.S. Expansion Bolt Co., York, Pa.
Spiralok	374,723 1/23/40	Metal pipe fittings	Pacific Pipe Co. San Francisco, Calif.
Durolok	373,608 12/12/39	Slide operated fasteners	Standard Products Corp., New York, N.Y.

Mark	Reg. No. & Reg. Date	Goods	Owner
Line Lok & design	381,542 9/20/40	Clothes line holders, pulleys, blocks, etc.	F. W. Sauer, d.b.a. Fred W. Sauer Mfg. Co., Newark, N.J.
Dix-Lock	384,909 2/4/41	Metal pipe and hose couplings	Dixon Valve & Coupling Co., Philadelphia, Pa.
Speedlock	350,844 10/5/37	Hose fittings	Cleveland Brass Mfg. Co., Cleveland, Ohio
Polox	279,518 1/20/31	Combined adhesive cement and solder	Plox Mfg. Co., Merriam, Kans.

(c) The following parties use the unregistered marks upon the goods hereinafter identified:

Mark	Goods	Owner
Mark	Goods	Owner
Life-Lok	Interlocking wedding and engagement rings	Manne & Son
Snap-Lock	Clip device to hold wedding and engagement rings together	Royal Jewelry Stores, N.Y., N.J., Conn. and Pa.
Flex-Let Tru-Lock: Tru-Lock	Locking device for bracelets, watch bands, etc.	Flex-Let Expansion Products: Philadelphia, Dallas, Los Angeles, Montreal
Looplock	Toilet covers, bath-mats rugs	Sanford Mills
Seam Lock	Woven pile carpet	Milton Newman
Quick Lox	Metal drums having removable heads and closure fasteners for such drums	Stevens Metal Co.
Lok-Screw	Two-part threaded blind rivets	The Dill Manufacturing Co.

Mark	Goods	Owner
Locklath	Plaster boards and plaster wall boards	Plastoid Products, Inc.
Loc Lip	Ceramic products having interlocking joints	Ric-Wil Co.
Lock Joint	Track brackets and track for sliding	Richards-Wilcox Co.
Lock Link	Chains	American Chain Co. Inc.
Locknob	Lamp chimneys	R. E. Dietz Co.
Lockon	Track contacts for electric toy trains	The Lionel Corporation
Lock-Air	Anti-leak filler for inner tubes for tires	Lock Co., Inc. Mineola, N.Y.

NAYLOR and LASSAGNE,
JAS. M. NAYLOR,
JOHN VAUGHAN GRONER.
By /s/ JAS. M. NAYLOR,
Attorneys for Defendants.

Dated: March 4, 1949.

Service of copy acknowledged.

[Endorsed]: Filed March 5, 1949.

[Title of District Court and Causes.]

PLAINTIFF'S ADMISSIONS AND DENIALS IN RESPONSE TO DEFENDANT'S REQUEST FOR ADMISSIONS UNDER RULE 36

Comes Now Joseph Granat, president of Granat Bros., a corporation, the plaintiff above named, and

being first duly sworn, deposes and says, that the following responses to the request for admissions filed herein under Rule 36 by defendants are true of his own knowledge, save and except as to those matters stated on information and belief, and as to those matters he believes them to be true:

I.

In response to the request for admission labeled (a) and subdivisions (1), (2), (3) and (4) thereunder, plaintiff denies that with respect to the trade-mark "Wedlock" or "Wed Lok" that its claim to ownership is based upon the chain or any chain of title such as set forth in said request (a) subdivisions (1), (2), (3) and (4), but that plaintiff's claim to ownership of said trade-mark is based upon bona fide use by plaintiff in interstate commerce of its trade-mark "Wed Lok", and that such use has been continuous since approximately the year 1934 to date as applied to wedding and engagement ring ensembles. Plaintiff admits, however, that its claim to ownership of registration No. 185,365, dated June 10, 1924, is based upon the assignment set forth in subdivision (4) of said request labeled (a).

As to the assignments set forth in subdivisions (1), (2) and (3) of said request (a), plaintiff has no knowledge thereof and as no copies or facsimiles thereof or other evidence thereof was furnished with said request for admissions, plaintiff has insufficient information upon which to base either an admission or a denial thereof.

II.

In response to the request for admission labeled (b) of said request for admissions under Rule 36, plaintiff admits that such trade-marks were registered in the United States Patent Office for the various and sundry classification of goods specified in such registrations. Plaintiff does not admit, however, that such registrations have any bearing, relevancy, or materiality to any issues herein raised or that any such trade-marks have been or are now being used.

III.

As to the request labeled (c) in the request for admissions under Rule 36, plaintiff has no knowledge that the listed parties use the marks therein set forth upon the goods therein identified and, therefore, has insufficient information upon which to base a denial or admission, and on that ground denies the same.

/s/ JOSEPH GRANAT.

Subscribed and sworn to before me, a notary public, this 14th day of March, 1949.

/s/ CATHERINE BRUCE,

Notary Public in and for the City and County of San Francisco, State of California.

My Commission Expires: Sept. 28, 1952.

Receipt of copy acknowledged.

[Endorsed]: Filed March 15, 1949.

[Title of District Court and Causes.]

STIPULATION AND ORDER EXTENDING TIME FOR DOCKETING APPEAL

It is hereby stipulated by and between counsel for the above-entitled parties that the time for docketing the appeal in the above-entitled cause may be extended to and including December 23rd, 1943.

NAYLOR and LASSAGNE,
JAS. M. NAYLOR,
JOHN VAUGHAN GRONER,
By /s/ JAS. M. NAYLOR,
Attorneys for Defendants.

OSCAR A. MELLIN,
LE ROY HANSCOM,
JACK E. HURSH,
By /s/ JACK E. HURSH,
Attorneys for Plaintiff.

ORDER

Good cause appearing therefor, attendant upon the preparation of the transcript of the record on appeal, it is hereby

Ordered that the time for docketing the appeal in the above-entitled cause may be, and the same

is hereby extended to and including December 23rd, 1949.

Dated: November 23, 1949.

/s/ LOUIS E. GOODMAN,
U. S. District Judge.

Certification

No previous extension by order or stipulation.

/s/ JAS. M. NAYLOR.

[Endorsed]: Filed November 25, 1949.

[Title of District Court and Causes.]

CONCISE STATEMENT OF POINTS ON WHICH DEFENDANTS - APPELLEES AND CROSS-APPELLANTS INTEND TO RELY ON APPEAL

Come now defendants-appellees and cross-appellants, above named, and make the following concise statements of the points on which they intend to rely to the United States Court of Appeals for the Ninth Circuit from the Judgment entered September 15th, 1949, in the above-entitled cause:

1. The Court erred in finding that plaintiff's trade mark "Wed Lok" is a distinctive and valid trade mark.

2. The Court erred in not finding that plaintiff has competed unfairly with defendants Feature

Ring Co., Inc., S. Herbert Friend or Leonard V. Bloch.

3. The Court erred in dismissing the counterclaim of the defendants Feature Ring Co., Inc., S. Herbert Friend and Leonard V. Bloch.

4. The Court erred in failing to award damages to defendants herein on their counterclaim.

5. The Court erred in failing to award defendants their costs incurred on the trial of the cause.

NAYLOR and LASSAGNE,
JAS. M. NAYLOR,
JOHN VAUGHAN GRONER,
By /s/ JAS. M. NAYLOR,
Attorneys for Defendants-Appellee and Cross-Appellants.

Certificate of Service attached.

[Endorsed]: Filed November 28, 1949.

[Title of District Court and Causes.]

STIPULATION RELATIVE TO FILING OF APPEAL BOND

It is hereby stipulated by and between counsel for the above-entitled parties that the defendants may file their appeal bond herein, pursuant to Rules of Civil Procedure Rule 73(e) concurrently with the filing of this stipulation provided the same be

filed prior to the docketing of the appeals with the Court of Appeals for the Ninth Circuit.

NAYLOR and LASSAGNE,
JAS. M. NAYLOR,
JOHN VAUGHAN GRONER,
By /s/ JAS. M. NAYLOR,
Attorneys for Defendants.
OSCAR A. MELLIN,
LE ROY HANSCOM,
JACK E. HURSH,
By /s/ JACK E. HURSH,
Attorneys for Plaintiff.

It is so Ordered this 28th day of November, 1949.

/s/ LOUIS E. GOODMAN,
U. S. District Judge.

[Endorsed]: Filed November 28, 1949.

[Title of District Court and Causes.]

UNDERTAKING FOR COSTS ON APPEAL

Whereas the above named Defendant and Intervening Defendant have prosecuted an appeal to the United States Court of Appeals for the Ninth Circuit to reverse the judgment of the District Court of the United States for the Northern District of California, Southern Division, in the above-entitled cause.

Now, Therefore, in consideration of the premises and of such appeal, the undersigned The Travelers Indemnity Company, a corporation organized and existing under the Laws of the State of Connecticut, does hereby undertake and promise on the part of the Appellants, the above named Defendant and Intervening Defendant, that said Appellants will pay all damages and costs which may be awarded against them on the appeal, or on a dismissal thereof, not exceeding Two Hundred Fifty and No/100ths Dollars ($250.00), to which amount it acknowledges itself bound.

In Witness Whereof, the said Surety has caused these presents to be executed and its official seal attached by its duly authorized Attorney-in-Fact at San Francisco, California, this 28th day of November, 1949.

THE TRAVELERS
INDEMNITY COMPANY.

[Seal] By /s/ R. N. MITCHELL,
Attorney-in-Fact.

Bond No. 218989, Premium charged for this Bond —$10.00 per annum.

State of California,
City and County of San Francisco—ss.

On this 28th day of November, 1949, before me personally came R. N. Mitchell to me known, who being by me duly sworn, did depose and say: that he is Attorney(s)-in-Fact of The Travelers In-

demnity Company, the Corporation described in and which executed the foregoing instrument; that he know(s) the seal of said Corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by authority granted to him in accordance with the By-Laws of the said Corporation, and that he signed his name thereto by like authority.

[Seal] /s/ ELIZABETH MAKI,
Notary Public.

My Commission Expires March 1, 1953.

[Endorsed]: Filed November 28, 1949.

[Title of District Court and Causes.]

CERTIFICATE OF CLERK TO SUPPLEMENT TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify the foregoing documents and accompanying exhibits, are the originals filed in this Court, in the above-entitled case, and that they constitute the Supplement to the Record on Appeal, as designated by the parties, to wit:

Request for Admission Under Rule 36.

Plaintiff's Admission and Denials in Response to Defendants' Request for Admissions Under Rule 36.

Stipulation and Order Extending Time for Docketing Appeal.

Defendants' Designation of Contents of Record on Appeal.

Concise Statement of Points on Which Defendants-Appellees and Cross-Appellants Intend to Rely on Appeal.

Stipulation Relative to Filing of Appeal Bond.

Undertaking for Costs on Appeal.

Plaintiff's Counter Designation of Contents of Record on Appeal.

Defendants' Exhibits Nos. 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39 and 40.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 21st day of December, A.D. 1949.

C. W. CALBREATH,
Clerk.

[Seal] By /s/ M. E. VAN BUREN,
Deputy Clerk.

In the United States Court of Appeals
for the Ninth Circuit

No. 28219-H

GRANAT BROS., a Corporation,

Appellant,

vs.

SAMUEL H. FRIEND, S. HERBERT FRIEND and LEONARD V. BLOCH, Co-Partners, Doing Business Under the Firm Name and Style of S. H. Friend,

Appellees,

and

FEATURE RING CO., INC.,

Intervening Appellee.

NOTICE OF ADOPTION OF STATEMENT OF POINTS

Appellant hereby adopts as its Statement of Points, under Rule 19(6), on its Appeal the Concise Statement on Appeal, under Rule 75(a) appearing in the transcript of record certified by the Clerk of the District Court and filed herein.

Dated: November 25th, 1949.

MELLIN AND HANSCOM.

By /s/ JACK E. HURSH,

Attorneys for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed Dec. 21, 1949.

In the United States Court of Appeals
for the Ninth Circuit

Appeal No. 12,407

SAMUEL H. FRIEND, S. HERBERT FRIEND and LEONARD V. BLOCH, Co-Partners, Doing Business Under the Firm Name and Style of S. H. Friend, and Feature Ring Co., Inc., a Corporation,

Appellants and Cross-Appellees,

vs.

GRANAT BROS., a Corporation,

Appellee and Cross-Appellant.

Appeal No. 12,408

HERBERT BROWN, an Individual, and FEATURE RING CO., a Corporation,

Appellants and Cross-Appellees,

vs.

GRANAT BROS., a Corporation,

Appellee and Cross-Appellant.

STIPULATION CONSOLIDATING APPEALS

It is hereby stipulated by and between counsel for the above-entitled parties that the above-entitled appeals may be consolidated for the convenience of the Court and the parties hereto to the extent

of the printing of a single record and with a single hearing serving the purpose of all appeals.

It is further stipulated and agreed that, as a means of reducing the number of briefs to be filed herein, Granat Bros., as appellee and cross-appellant herein, may file an original brief covering the two appeals herein; that Samuel H. Friend, et al, as appellants and cross-appellees, may file a brief in reply thereto and covering both appeals, and that said Granat Bros. may then file a brief replying to the brief of said Samuel H. Friend, et al.

NAYLOR and LASSAGNE,
JAS. M. NAYLOR,
JOHN VAUGHAN GRONER.
By /s/ JAS. M. NAYLOR,
Attorneys for Appellants and Cross-Appellees.

OSCAR A. MELLIN,
LE ROY HANSCOM,
JACK E. HURSH,
By /s/ JACK E. HURSH,
Attorneys for Appellee and Cross-Appellant.

It is so Ordered: December 21, 1949.
/s/ WILLIAM DENMAN,
Circuit Judge, United States Court of Appeals.
/s/ WILLIAM HEALY,
/s/ H. T. BONE.

[Endorsed]: Filed Dec. 21, 1949.

[Title of Court of Appeals and Causes.]

DESIGNATION OF APPELLANT-CROSS-APPELLEE

Appellant-Cross-Appellee, Granat Bros., hereby adopts the Designation of Contents of Record on Appeal and Plaintiff's Counter Designation of Contents of Record on Appeal in the United States District Court, and already a part of the record on Appeal herein, and in addition thereto, Exhibit JJJ—Deposition, Moritz Jacoby; Exhibit KKK—Deposition, Holly G. Jackson; Exhibit LLL—Deposition, Leonard B. Goldblatt; Exhibit MMM—Deposition, Philip Kleiger; Exhibit NNN—Deposition, Arthur A. Navarro; Exhibit OOO—Deposition, Charles Van Sipma; Exhibit PPP—Deposition, Norman Kirnes; Exhibit QQQ—Deposition, Harry Gamler and Exhibit RRR—Deposition, Benjamin J. Shapiro, as its designation on Appeal of the record to be printed.

Dated: Dec. 20, 1949.

MELLIN AND HANSCOM.

By /s/ JACK E. HURSH,

Attorney for Appellant-Cross-Appellee.

Receipt of copy acknowledged.

[Endorsed]: Filed Dec. 21, 1949.

[Title of Court of Appeals and Causes.]

DESIGNATION OF APPELLANTS-CROSS-APPELLEES

Appellants and Cross-Appellees, Samuel H. Friend et al, hereby adopt Defendants' Designation of Contents of Record on Appeal, heretofore filed by them in the District Court and now on file herein, as their designation on appeal of the record to be printed, save and except Item 4 thereof which identifies exhibits to be either treated as original exhibits or included in a book of exhibits, subject to the terms of the Stipulation and Order Relative to Exhibits and Book of Exhibits, filed concurrently herewith.

Dated: December 29th, 1949.

NAYLOR AND LASSAGNE,
JAS. M. NAYLOR,
JOHN VAUGHAN GRONER,
By /s/ JAS. M. NAYLOR,
Attorneys for Appellants.

Receipt of copy acknowledged.

[Endorsed]: Filed Dec. 30, 1949.

[Title of Court of Appeals and Causes.]

NOTICE OF ADOPTION OF STATEMENT OF POINTS

Appellants and Cross-Appellees, Samuel H. Friend et al, pursuant to Rule 19(6), hereby adopt as their Statement of Points on their appeals, the Concise Statement of Points on which Defendants-Appellants and Cross-Appellees Intend to Rely on Appeal, heretofore filed pursuant to R.C.P. Rule 75(a) and which appear in the transcript of record certified by the Clerk of the District Court on file herein.

Dated: December 29th, 1949.

NAYLOR AND LASSAGNE,
JAS. M. NAYLOR,
JOHN VAUGHAN GRONER,
By /s/ JAS. M. NAYLOR,
Attorneys for Appellants.

Receipt of copy acknowledged.

[Endorsed]: Filed Dec. 30, 1949.

[Title of Court of Appeals and Causes.]

STIPULATION AND ORDER RELATIVE TO EXHIBITS AND BOOK OF EXHIBITS

It is hereby stipulated by and between the parties to the above-entitled causes, and with the approval of the Court, that the Clerk be directed to include within a Book of Exhibits, the following exhibits in the case:

1. Plaintiff's Exhibits K, L, M, Y, Z, AA, BB, EEE, FFF.

2. Defendants' Exhibits 1 to 4, inclusive, 6 and 37.

It is further stipulated, with approval of the Court, that the following exhibits may be used as physical exhibits, neither printed in a Book of Exhibits nor the Transcript:

3. Plaintiff's Exhibits A to J, inclusive, N to X, inclusive, CC to DDD, inclusive, and GGG to III, inclusive.

4. Defendants' Exhibits 5, 7 to 36, inclusive, 39 and 40.

5. Plaintiff's deposition exhibits offered in Plaintiff's Exhibits JJJ to RRR, inclusive.

6. Defendants' deposition exhibits offered in Defendants' Exhibits 39 and 40.

The exhibits herein designated as physical exhibits consist of various trade mark file histories, advertising mats and material, newspaper and maga-

zine advertisements, magazines, ring sets, dies for making ring sets, bulky in nature and none of which lend themselves to satisfactory, convenient or economic reproduction in printed form.

It is further stipulated that with respect to Defendants' Exhibit 37 (a book of trade mark registrations) hereinabove designated for inclusion in a Book of Exhibits, there is reserved unto appellee, Granat Bros., the right to bring a motion to strike the same to determine its status as a part of the record herein, if so advised.

Dated: December 29th, 1949.

NAYLOR AND LASSAGNE,
JAS. M. NAYLOR,
JOHN VAUGHAN GRONER,
By /s/ JAS. M. NAYLOR,
Attorneys for Appellants.

It is approved and so Ordered this 31st day of December, 1949.

OSCAR A. MELLIN,
LEROY HANSCOM,
JACK E. HURSH,
By /s/ JACK E. HURSH,
Attorneys for Appellee.
/s/ WILLIAM DENMAN,
U. S. Circuit Judge.
/s/ WILLIAM HEALY,
/s/ HOMER BONE,
Judges U. S. Court of Appeals for the Ninth Circuit.

[Endorsed]: Filed Jan. 4, 1950.

No. 12408

United States
Court of Appeals
For the Ninth Circuit.

HERBERT BROWN and FEATURE RING CO.,
Appellants,

vs.

GRANAT BROS., a corporation,
Appellee.

GRANAT BROS., a corporation,
Appellant,

vs.

HERBERT BROWN and FEATURE RING CO., INC.,
Appellees.

Transcript of Record
IN FOUR VOLUMES
Volume I
(Pages 1 to 35)

**Appeals from the United States District Court,
Northern District of California,
Southern Division.**

FILED
APR 5 1950
PAUL P. O'BRIEN, CLERK

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

No. 12408

United States
Court of Appeals
For the Ninth Circuit.

HERBERT BROWN and FEATURE RING CO.,
Appellants,

vs.

GRANAT BROS., a corporation,
Appellee.

GRANAT BROS., a corporation,
Appellant,

vs.

HERBERT BROWN and FEATURE RING CO., INC.,
Appellees.

Transcript of Record
IN FOUR VOLUMES
Volume I
(Pages 1 to 35)

**Appeals from the United States District Court,
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Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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NAMES AND ADDRESSES OF ATTORNEYS

NAYLOR and LASSAGNE,

JAMES M. NAYLOR,

420 Russ Building,
San Francisco, California.

JOHN VAUGHAN GRONER,

20 Exchange Place,
New York, New York.

Attorneys for Defendant, Intervening Defendant and Appellants and Cross-Appellees.

MELLIN and HANSCOM,
OSCAR A. MELLIN,
LEROY HANSCOM,
JACK E. HURSH,

391 Sutter Street,
San Francisco, California.

In the United States District Court, Northern District of California, Southern Division

Civil Action No. 28220-H

GRANAT BROS., a corporation,

Plaintiff,

vs.

HERBERT BROWN, an individual,

Defendant.

COMPLAINT FOR TRADE-MARK INFRINGEMENT AND UNFAIR COMPETITION

Comes Now the above named plaintiff and for cause of action against the defendant above named, complains and alleges as follows:

I.

Plaintiff alleges that it is a corporation duly organized and existing under and by virtue of the laws of the State of California, and has a place of business in the City and County of San Francisco, State of California.

II.

Plaintiff is informed and believes and on information and belief alleges that the defendant Herbert Brown is an individual and is a resident of Salinas, County of Monterey, State of California, and is there doing business.

III.

Plaintiff alleges that this Court has jurisdiction of this cause in that it arises under the trade-mark laws of the United States concerning infringement of trade-marks duly registered under the laws of the United States, and that the value of the matter in controversy, exclusive of interest, exceeds the amount of $3,000.00.

IV.

Plaintiff alleges that it is the owner of all the right, title and interest in and to the trade-mark "Wedlock," and that said trade-mark "Wedlock" was registered in the United States Patent Office on June 10, 1924, certificate of registration No. 185,365, and that said certificate registration was assigned to plaintiff together with the good-will of the business in said trade-mark, and that plaintiff, ever since the assignment thereof, has been and now is the owner of all the right, title and interest therein and thereto.

V.

Plaintiff alleges that it is the owner of all the right, title and interest in and to the trade-mark "Wed-Lok"; that said trade-mark "Wed-Lock" was registered by said plaintiff in the United States Patent Office for finger rings, and said registration bears No. 430,436, and is dated June 10, 1947.

VI.

Plaintiff further alleges that said trade-marks

have been applied by plaintiff to finger rings sold in interstate commerce by said plaintiff continuously since the year 1934.

VII.

Plaintiff alleges that it is now engaged in and for many years past has been continuously engaged in the business of designing, manufacturing and selling finger rings, to which said trade-marks have been applied, throughout the entire United States of America, its territories and possessions, and has built up a large and enviable reputation and good-will in connection with said business, and that the value of said good-will is in excess of $25,000,000.00, and that the said trade-mark is applied to its said finger rings or to packages containing the same.

VIII.

Plaintiff alleges that it has spent large sums of money in advertising its said trade-marked finger rings throughout the entire United States of America, and since the year 1934 the sums so spent total in excess of $100,000.00, and that said advertising consists solely in advertising of its finger rings known and trade-marked with plaintiff's said trade-marks.

IX.

Plaintiff alleges that the retail sales value of its finger rings so trade-marked and sold by plaintiff exceeds the sum of $2,500,000.00.

X.

Plaintiff alleges that for more than twelve (12) years last past its said trade-marks have been understood by the public and the trade as designating the finger rings and business of the plaintiff, and has been so exclusively identified with the finger rings and business of plaintiff as to have acquired a secondary meaning as to indicate the finger rings and business of plaintiff and its alone.

XI.

Plaintiff alleges that the defendant is in the business of retail selling finger ring sets consisting of a wedding band and engagement ring, which defendant identifies by the use of the words "Feature-Lock," and has thereby infringed upon the trade-mark rights of this plaintiff.

XII.

Plaintiff alleges that the said ring sets sold by this plaintiff under its trade-marks and the ring sets sold by this defendant under the name "Feature-Lock" are goods of the same character and are directly competitive products.

XIII.

Plaintiff alleges that the mark used by defendant "Feature-Lock" and the plaintiff's trade-marks are so confusingly similar that the purchasing public is likely to be deceived, and that the "Feature-Lock"

finger ring sets of defendant can be palmed off on the public as the finger ring sets of this plaintiff.

XIV.

Plaintiff alleges that the mark "Feature-Lock" used by defendant is confusingly similar to plaintiff's said trade-marks.

XV.

Plaintiff alleges that the mark "Feature-Lock" applied by defendant to finger rings would cause confusion in the minds of the purchasing public who would believe that the finger ring sets sold under the said mark were the finger ring sets of this plaintiff.

XVI.

Plaintiff is informed and believes and on information and belief alleges that the words "Feature-Lock" have been and are being applied by defendant to finger rings with fraudulent intent on the part of the defendant to pass off its said finger rings as and for the finger ring sets of plaintiff with the purpose to deceive the public and enable the defendant to trade on the name and good-will of plaintiff.

XVII.

Plaintiff alleges that the defendant's use of the words "Feature-Lock" on its products have caused and will continue to cause confusion between the finger ring sets of plaintiff and defendant, and that

such confusion likely will have the effect of destroying the business, good-will and reputation heretofore established by plaintiff, all to the damage of plaintiff.

XVIII.

Plaintiff is informed and believes and on information and belief alleges that unless restrained by this Court, the defendant will continue to infringe on the rights of plaintiff and continue defendant's acts of unfair competition, all to the irreparable injury of plaintiff.

XIX.

Plaintiff alleges that it has no other speedy and adequate remedy save by this suit for an injunction.

XX.

Plaintiff is informed and believes and on information and belief alleges that defendant has derived unlawful gains and profits from his infringing acts, aforesaid, which plaintiff would otherwise have received but for such infringement by defendant.

XXI.

Plaintiff is informed and believes and on information and belief alleges that the acts of the defendant herein set forth have caused damage to plaintiff's business in an amount that cannot at this time be determined but is informed and believes and on information and belief alleges that said damage is in an amount in excess of $5,000.00.

Wherefore Plaintiff Prays:

1. That defendant be required to appear and answer this complaint.

2. That a permanent injunction issue out of and under the seal of this Court, enjoining the defendant, his associates, officers, attorneys, clerks, servants, agents, employees and confederates, and each of them, from using the trade-mark "Feature-Lock" in any fashion whatsoever in connection with any business or products relating to finger rings.

3. For an accounting of profits and damages for the acts of trade-mark infringement committed by the defendant.

4. That plaintiff have and recover from defendant its actual damages sustained by reason of the infringement and unfair competition of defendant.

5. That said profits and damages be trebled in view of defendant's deliberate, intentional and fraudulent infringement and interference with the business of plaintiff.

6. That plaintiff have its costs and disbursements herein and for such other and further or different relief that the Court may deem appropriate in the premises.

GRANAT BROS.,
A Corporation,

By /s/ OSCAR A. MELLIN, Of
MELLIN and HANSCOM,
Attorneys for Plaintiff.

[Endorsed]: Filed August 3, 1948.

STIPULATED INTERVENTION OF FEATURE RING CO., INC., AS DEFENDANTS

(See No. 12407, Vol. I, page 11)

CONSOLIDATED ANSWER AND COUNTERCLAIM

(See No. 12407, Vol. I, page 12)

REPLY TO DEFENDANTS' COUNTERCLAIM

(See No. 12407, Vol. I, page 33)

STIPULATION CONSOLIDATING CASES FOR TRIAL

(See No. 12407, Vol. I, page 9)

ORDER DATED JULY 8, 1949

(See No. 12407, Vol. I, page 36)

REQUEST FOR ADMISSIONS UNDER RULE 36

(See No. 12407, Vol. I, page 62)

PLAINTIFF'S ADMISSIONS AND DENIALS IN RESPONSE TO DEFENDANT'S REQUEST FOR ADMISSIONS UNDER RULE 36

(See No. 12407, Vol. I, page 68)

District of California, Southern Division
District Court of the United States, Northern

At A Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 23rd day of August, in the year of our Lord one thousand nine hundred and forty-eight.

Present: The Honorable George B. Harris,
District Judge.

ORDERED CASES CONSOLIDATED FOR TRIAL

Civ. No. 28219-H, Granat Bros., etc. vs. Samuel H. Friend, et al.;

Civ. No. 28220-H, Granat Bros., etc. vs. Herbert Brown, etc.;

In accordance with a stipulation and order this day filed, it is Ordered that these cases be and the same are hereby consolidated for trial.

In the United States District Court, Northern District of California, Southern Division

Civil Action No. 28220-H

GRANAT BROS., a corporation,

Plaintiff,

vs.

HERBERT BROWN, an individual,

Defendant,

and

FEATURE RING CO., INC,

Intervening Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to Rule 52 of the Federal Rules of Civil Procedure and Rule 5(e) of the Rules of Practice of the District Court of the United States for the Northern District of California, the Court makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

I.

That plaintiff, Granat Bros., is a corporation duly organized and existing under and by virtue of the laws of the State of California, and has a place of business in the City and County of San Francisco, State of California.

II.

That defendant, Herbert Brown, is a resident of Salinas, County of Monterey, State of California and has a place of business at Salinas, County of Monterey, State of California.

III.

That the intervening defendant, Feature Ring Co., is a corporation duly organized and existing under and by virtue of the laws of the State of New York, and has a place of business in the City of New York, State of New York.

IV.

That plaintiff is the owner of all of the right, title and interest in and to the trade-mark "Wed-Lok" and that plaintiff registered the trade-mark "Wed-Lok" in the United States Patent Office for finger rings, said registration bearing No. 430,436, dated June 10, 1947.

V.

That plaintiff adopted the trade-mark "Wed-Lok" for wedding ensembles in the year 1934 and commenced to use the same at that time.

VI.

That plaintiff applied the trade-mark "Wed-Lok" to finger rings and wedding ensembles and said finger rings and wedding ring ensembles were sold in interstate commerce over the entire United

States by plaintiff continuously since at least the year 1936.

VII.

That plaintiff has never abandoned the trade-mark "Wed-Lok".

VIII.

Plaintiff's trade-mark "Wed-Lok" is not primarily descriptive of the ring ensembles marketed and sold by plaintiff, but it is used in a suggestive or figurative sense and is a valid registered trade-mark.

IX.

That plaintiff has been the exclusive user of the trade-mark "Wed-Lok" continuously since at least the year 1936.

X.

That plaintiff made extensive sales of its products trade-marked "Wed-Lok" throughout the entire United States from the year 1934 to date, and such sales in the trade-marked products were in the amount of approximately Three Million Dollars ($3,000,000.00).

XI.

That plaintiff's trade-marked products, "Wed-Lok" and the trade-mark "Wed-Lok" have been widely and very extensively advertised throughout the United States from the year 1934 to the present, excluding the war years of 1942, 1943, 1944 and

1945; and such advertising, exclusive of extensive dealer advertising, cost approximately One Hundred Fifty Three Thousand Dollars ($153,000.00).

XII.

That in addition to plaintiff's advertising of trade-mark products "Wed-Lok" plaintiff's dealers throughout the United States extensively advertised them in local papers.

XIII.

That the words "Feature Lock" are sufficiently distinct from "Wed-Lok" as to preclude likelihood that the Feature Ring Co.'s product will be passed off as those of plaintiff.

XIV.

The evidence fails to show confusion in the ultimate customers between the products marked "Feature Lock" and plaintiff's products marked "Wed-Lok", and neither trade-mark infringement nor unfair competition is established.

XV.

That the notices sent by plaintiff to customers of defendant, Feature Ring Co., were sent in good faith and suit was brought by plaintiff seasonably after sending the notices.

XVI.

That the evidence establishes that plaintiff did not unfairly compete with the Feature Ring Co.

Conclusions of Law

I.

That plaintiff is the owner of the trade-mark "Wed-Lok" as applied to wedding ring ensembles.

II.

That the trade-mark "Wed-Lok" is a distinctive and valid trade-mark.

III.

That plaintiff is the owner of Trade-Mark Registration No. 430,436, dated June 10, 1947, and said registration is good and valid in law.

IV.

That this Court has jurisdiction of this cause in that the same is founded upon the trade-mark laws of the United States.

V.

That no confusion was shown between the ultimate customers of plaintiff and defendants and therefore plaintiff failed to establish trade-mark or unfair competition by defendants.

VI.

That the trade-mark "Feature Lock" does not infringe upon the trade-mark "Wed-Lok".

VII.

That the defendants have not unfairly competed with the plaintiff.

VIII.

That the plaintiff has not unfairly competed with the defendant, Feature Ring Co.

IX.

That no damages were proved by any of the parties hereto.

X.

That each party shall bear its own costs.

DAL M. LEMMON,
Judge of the District Court.

Receipt of copy acknowledged.

Lodged September 8, 1949.

[Endorsed]: Filed September 14, 1949.

In the United States District Court, Northern District of California, Southern Division

Civil Action No. 28220-H

GRANAT BROS., a Corporation,
Plaintiff,

vs.

HERBERT BROWN, an Individual,
Defendant,

and

FEATURE RING CO., INC.,
Intervening Defendant.

JUDGMENT

This cause having come on to be heard upon the issues raised by the Complaint, Consolidated Answer and Counterclaim and Reply to Defendant's Counterclaim, and the Court having filed its Findings of Fact and Conclusions of Law, it is ordered adjudged and decreed:

I.

That plaintiff, Granat Bros., is a corporation duly organized and existing under and by virtue of the laws of the State of California, and has a place of business in the City and County of San Francisco, State of California.

II.

That defendant, Herbert Brown, is a resident of Salinas, County of Monterey, State of California, and has a place of business at Salinas, County of Monterey, State of California.

III.

That the intervening defendant, Feature Ring Co., is a corporation duly organized and existing under and by virtue of the laws of the State of New York, and has a place of business in the City of New York, State of New York.

IV.

That this Court has jurisdiction of this cause in that the same is founded upon the trade-mark laws of the United States.

V.

That plaintiff is the owner of all of the right, title and interest in and to the trade-mark "Wed-Lok" and that plaintiff registered the trade-mark "Wed-Lok" in the United States Patent Office for finger rings, said registration bearing No. 430,436, dated June 10, 1947.

VI.

That plaintiff's trade-mark "Wed-Lok" is a distinctive and valid trade-mark.

VII.

That defendants have in using the trade-mark "Feature Lock" not infringed upon plaintiff's trade-mark "Wed-Lok".

VIII.

That defendants have not unfairly competed with plaintiff.

IX.

That plaintiff has not unfairly competed with defendants, Feature Ring Co., Inc. and Herbert Brown.

X.

That the complaint of plaintiff herein be and the same is hereby dismissed as to defendants.

XI.

That the counterclaim of defendants, Feature Ring Co., Inc., S. Herbert Friend and Leonard V. Block be and the same is hereby dismissed as to plaintiff.

XII.

That no damages are to be awarded to any of the parties.

XIII.

That each party bear its own costs.

/s/ DAL M. LEMMON,
U. S. District Judge.

Receipt of copy acknowledged.

Lodged September 8, 1949.

[Endorsed]: Filed September 14, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT UNDER RULE 73(b)

Notice is hereby given that Herbert Brown and Feature Ring Co., Inc., defendants above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit, from the parts of the judgment entered in this action on September 15, 1949, which adjudge as follows:

"VI. That plaintiff's trade-mark 'Wed-Lok' is a distinctive and valid trade-mark.

IX. That plaintiff has not unfairly competed with defendants, Feature Ring Co., Inc. and Herbert Brown.

XI. That the counterclaim of defendants, Feature Ring Co., Inc., S. Herbert Friend and Leonard V. Block be and the same is hereby dismissed as to plaintiff."

XII. Insofar as it fails to award damages to defendants herein on their counterclaim.

XIII. Insofar as it fails to award defendants their costs herein.

Dated: October 15, 1949.

NAYLOR and LASSAGNE,

JAS. M. NAYLOR,

JOHN VAUGHAN GRONER,

By /s/ JAS. M. NAYLOR,

Attorneys for Defendants.

[Endorsed]: Filed October 15, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Granat Bros., the Plaintiff above named, hereby appeals to the Court of Appeals for the Ninth Circuit from the following parts, and each thereof, of the judgment entered in this action on the 15th day of September, 1949:

(a) Paragraph numbered VII of said judgment;

(b) Paragraph numbered VIII of said judgment.

Dated: At San Francisco, California, this 14th day of October, 1949.

MELLIN AND HANSCOM,

By /s/ OSCAR T. MELLIN,

Attorneys for Plaintiff.

[Endorsed]: Filed October 15, 1949.

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men by These Presents, That we, Granat Bros., a corporation, as Principal, and Indemnity Insurance Company of North America, a corporation, as Surety, are held and firmly bound unto Herbert Brown, an individual, Defendant and Feature Ring Co., Inc., Intervening Defendant above named, in the full and just sum of Two Hundred Fifty and No/100 Dollars ($250.00) to be paid to

the said Herbert Brown, an individual, Defendant and Feature Ring Co., Inc., Intervening Defendant, or their successors or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 14th day of October, 1949.

Whereas, lately, in the District Court of the United States for the Northern District of California, Southern Division, in a suit depending in said Court between Granat Bros., a corporation, Plaintiff and Herbert Brown, an individual, Defendant and Feature Ring Co., Inc., Intervening Defendant, a judgment was rendered against the Plaintiff and said Plaintiff has duly filed notice of appeal from said judgment:

Now, Therefore, the condition of the above obligation is such that if the said Plaintiff shall prosecute the appeal with effect and pay all costs if the appeal is dismissed, or the judgment affirmed, or such costs as the appellate court may award if the judgment is modified, then the above obligation to be void; otherwise to remain in full force and virtue.

GRANAT BROS., a corporation,
Principal.

INDEMNITY INSURANCE
COMPANY OF NORTH
AMERICA,

[Seal] By /s/ JAMES A. SMITH,
Attorney-in-Fact.

State of California,
San Francisco, County of San Francisco—ss.

On this 14th day of October in the year one thousand nine hundred and forty-nine before me Fred G. Ainslie, a Notary Public in and for the City and County of San Francisco, personally appeared James A. Smith, known to me to be the person whose name is subscribed to the within instrument as the Attorney-in-fact of the Indemnity Insurance Company of North America, and acknowledged to me that he subscribed the name of the Indemnity Insurance Company of North America thereto as principal, and his own name, as Attorney-in-fact.

[Seal] /s/ FRED G. AINSLIE,
Notary Public in and for the City and County of San Francisco, State of California.

My Commission Expires August 27, 1951.

Bond No. 124955, Premium for this Bond is $10.00 per annum.

[Endorsed]: Filed Oct. 15, 1949.

[Title of District Court and Cause.]

CONCISE STATEMENT OF THE POINTS ON WHICH PLAINTIFF-APPELLANT INTENDS TO RELY ON APPEAL

Comes now plaintiff-appellant, above-named, and makes the following concise statement of the points

on which it intends to rely for appeal to the United States Court of Appeals for the Ninth Circuit from the Judgment entered September 15, 1949, in the above-entitled cause.

1.

The Court erred in finding that the defendants in using the trade-mark "Feature Lock" did not infringe upon plaintiff's trade-mark "Wed-Lok."

2.

The Court erred in not finding that the defendants in using the trade-mark "Feature Lock" infringed upon plaintiff's trade-mark "Wed-Lok."

3.

The Court erred in finding that defendants have not unfairly competed with plaintiff.

4.

The Court erred in not finding that defendants have unfairly competed with plaintiff.

5.

The Court erred in not finding that plaintiff's trade-mark had acquired a secondary meaning identifying the goods of plaintiff and its goods alone.

6.

The Court erred in finding that the words "Feature Lock" are sufficiently distinct from the words

"Wed-Lok" as to preclude the likelihood that Feature Ring Co., Inc.'s products will be passed off as those of plaintiff's.

7.

The Court erred in not finding that the words "Feature Lock" are not sufficiently distinct from the words "Wed-Lok" as to preclude the likelihood that Feature Ring Co., Inc.'s products will be passed off as those of plaintiff's.

8.

The Court erred in concluding that it was necessary to show confusion between customers of plaintiff and defendants before plaintiff could establish trade-mark infringement by defendants.

9.

The Court erred in not concluding that it was not necessary to show confusion between customers of plaintiff and defendants before plaintiff could establish trade-mark infringement by defendants.

10.

The Court erred in concluding that it was necessary to show confusion between customers of plaintiff and defendants before plaintiff could establish unfair competition by defendants.

11.

The Court erred in not concluding that it was not necessary to show confusion between customers

of plaintiff and defendants before plaintiff could establish unfair competition by defendants.

MELLIN AND HANSCOM,

By /s/ OSCAR T. MELLIN,

LEROY HANSCOM,

JACK E. HURSH,

Attorneys for Plaintiff-Appellant.

Proof of Service attached.

[Endorsed]: Filed Nov. 19, 1949.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing documents, listed below, are the originals filed in this Court, or a true and correct copy of an order entered on the minutes of this Court, in the above-entitled case, and that they constitute the Record on Appeal herein, as designated by the Appellant, to wit:

Complaint for Trade-Mark Infringement and Unfair Competition

Minute Order of August 23, 1948—Consolidating Cases for Trial

Findings of Fact and Conclusions of Law

Judgment

Notice of Appeal to United States Court of Appeals by Defendants

Notice of Appeal by Plaintiff

Bond on Appeal by Plaintiff

Concise Statement of the Points on Which Plaintiff-Appellant Intends to Rely on Appeal

Designation of Contents of Record on Appeal by Plaintiff-Appellant.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 22nd day of November, A.D. 1949.

C. W. CALBREATH,
Clerk,

[Seal] By /s/ M. E. VAN BUREN,
Deputy Clerk.

[Title of District Court and Cause.]

STIPULATION AND ORDER EXTENDING TIME FOR DOCKETING APPEAL

It is hereby stipulated by and between counsel for the above entitled parties that the time for docketing the appeal in the above entitled cause may be extended to and including December 23rd, 1949.

NAYLOR and LASSAGNE,

JAS. M. NAYLOR,

JOHN VAUGHAN GRONER,

By /s/ JAS. M. NAYLOR,

Attorneys for Defendants.

OSCAR A. MELLIN,

LE ROY HANSCOM,

JACK E. HURSH,

By /s/ JACK E. HURSH,

Attorneys for Plaintiff.

ORDER

Good cause appearing therefor, attendant upon the preparation of the transcript of the record on appeal, it is hereby

Ordered that the time for docketing the appeal in the above entitled cause may be, and the same is

hereby extended to and including December 23rd, 1949.

Dated November 23rd, 1949.

/s/ LOUIS GOODMAN,
U. S. District Judge.

Certification

No previous extension by order or stipulation.
/s/ JAS. M. NAYLOR.

[Endorsed]: Filed Nov. 25, 1949.

In the United States District Court, Northern District of California, Southern Division

Civil Action No. 28220-H

GRANAT BROS., a corporation,
Plaintiff,

vs.

HERBERT BROWN, an individual,
Defendant,

and

FEATURE RING CO., INC.,
Intervening Defendant.

STIPULATION RELATIVE TO FILING OF APPEAL BOND

It is hereby stipulated by and between counsel for the above-entitled parties that the defendants

may file their appeal bond herein, pursuant to Rules of Civil Procedure Rule 73(e) concurrently with the filing of this stipulation provided the same be filed prior to the docketing of the appeals with the Court of Appeals for the Ninth Circuit.

NAYLOR and LASSAGNE,
JAS. M. NAYLOR,
JOHN VAUGHAN GRONER,
By /s/ JAS. M. NAYLOR,
Attorneys for Defendants.

OSCAR A. MELLIN,
LE ROY HANSCOM,
JACK E. HURSH,
By /s/ JACK E. HURSH,
Attorneys for Plaintiff.

It is so Ordered this 28th day of November, 1949.

/s/ LOUIS GOODMAN,
U. S. District Judge.

[Endorsed]: Filed Nov. 28, 1949.

[Title of District Court and Cause.]

CONCISE STATEMENT OF POINTS ON WHICH DEFENDANTS-APPELLEES AND CROSS-APPELLANTS INTEND TO RELY ON APPEAL

Come now defendants-appellees and cross-appel-

lants, above named, and make the following concise statements of the points on which they intend to rely to the United States Court of Appeals for the Ninth Circuit from the Judgment entered September 15th, 1949 in the above-entitled cause:

1. The Court erred in finding that plaintiff's trade-mark "Wed-Lok" is a distinctive and valid trade-mark.

2. The Court erred in not finding that plaintiff has competed unfairly with defendants Feature Ring Co., Inc. and Herbert Brown.

3. The Court erred in dismissing the counterclaim of the defendants Feature Ring Co., Inc. and Herbert Brown.

4. The Court erred in failing to award damages to defendants herein on their counterclaim.

5. The Court erred in failing to award defendants their costs incurred on the trial of the cause.

NAYLOR AND LASSAGNE,

JAS. M. NAYLOR,

JOHN VAUGHAN GRONER,

By /s/ JAS. M. NAYLOR,

Attorneys for Defendants-Appellees and Cross-Appellants.

Certificate of Service attached.

[Endorsed]: Filed Nov. 28, 1949.

STIPULATION AND ORDER EXTENDING TIME FOR DOCKETING APPEAL

(See No. 12407, Vol. I, page 71)

DEFENDANTS' DESIGNATION OF CONTENTS OF RECORD ON APPEAL

(See No. 12407, Vol. I, page 56)

PLAINTIFF'S COUNTER DESIGNATION OF CONTENTS OF RECORD ON APPEAL

(See No. 12407, Vol. I, page 58)

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

(See No. 12407, Vol. I, page 53)

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO SUPPLEMENT TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing documents, listed below, are the originals enter in this Court, in the above-entitled case, and that they constitute the Supplement to the Record on Appeals herein, as designated by the parties, to wit:

Stipulation and Order Extending Time for Docketing Appeal

Defendants' Designation of Contents of Record on Appeal

Concise Statement of Points on Which Defendants-Appellees and Cross-Appellants Intend to Rely on Appeal

Stipulation Relative to Filing of Appeal Bond

Undertaking for Costs on Appeal

Plaintiff's Counter Designation of Contents of Record on Appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 21st day of December, A.D. 1949.

C. W. CALBREATH,
Clerk,

[Seal] By /s/ M. E. VAN BUREN,
Deputy Clerk.

[Endorsed]: No. 12408. United States Court of Appeals for the Ninth Circuit. Herbert Brown and Feature Ring Co., Appellants, vs. Granat Bros., a corporation, Appellee. Granat Bros., a corporation, Appellant, vs. Herbert Brown and Feature Ring Co., Inc., Appellees. Transcript of Record. Appeals from the United States District Court for the Northern District of California, Southern Division.

Filed November 22, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 28220-H

GRANAT BROS., a corporation,

Appellant,

vs.

HERBERT BROWN, an individual,

Appellee,

and

FEATURE RING CO., INC.,

Intervening Appellee.

NOTICE OF ADOPTION OF STATEMENT OF POINTS

Appellant hereby adopts as its Statement of Points, under Rule 19(6) on its Appeal the Concise Statement on Appeal, under Rule 75(a) appearing in the transcript of record certified by the Clerk of the District Court and filed herein.

Dated: November 25th, 1949.

MELLIN AND HANSCOM,
By /s/ JACK E. HURSH,
Attorneys for Appellant.

Receipt of a copy of the within Notice of Adoption of Statement of Points is hereby acknowledged this 20th day of December, 1949.

NAYLOR & LASSAGNE
/s/ JAS. M. NAYLOR,
Attorneys for Appellee.

[Endorsed]: Filed Dec. 21, 1949.

[Title of Court of Appeals and Causes.]

DESIGNATION OF APPELLANT-CROSS-APPELLEE

Appellant-Cross-Appellee, Granat Bros., hereby adopts the Designation of Contents of Record on Appeal and Plaintiff's Counter Designation of Contents of Record on Appeal in the United States District Court, and already a part of the record on Appeal herein, and in addition thereto, Exhibit JJJ—Deposition, Moritz Jacoby; Exhibit KKK—Deposition, Holly G. Jackson; Exhibit LLL—Deposition, Leonard B. Goldblatt; Exhibit MMM—Deposition, Philip Kleiger; Exhibit NNN—Deposition, Arthur A. Navarro; Exhibit OOO—Deposition, Charles Van Sipma; Exhibit PPP—Deposition, Norman Kirnes; Exhibit QQQ — Deposition, Harry Gamler and Exhibit RRR—Deposition, Benjamin J. Shapiro, as its designation on Appeal of the record to be printed.

Dated: Dec. 20, 1949.

MELLIN AND HANSCOM,

By /s/ JACK E. HURSH,

Attorneys for Appellant-Cross-Appellee.

Receipt of copy acknowledged.

[Endorsed]: Filed Dec. 21, 1949.

No. 12407 – 12408

United States
Court of Appeals
for the Ninth Circuit.

SAMUEL H. FRIEND, S. HERBERT FRIEND, LEONARD V. BLOCK, Co-Partners, Doing Business Under the Firm Name and Style of S. H. Friend, and Feature Ring Co., Inc.,

Appellants,

vs.

GRANAT BROS., a Corporation,

Appellee.

GRANAT BROS., a Corporation,

Appellant,

vs.

SAMUEL H. FRIEND, S. HERBERT FRIEND and LEONARD V. BLOCK, Co-Partners, Doing Business Under the Firm Name and Style of S. H. Friend and Feature Ring Co., Inc.,

Appellees.

HERBERT BROWN and FEATURE RING CO.,

Appellants,

vs.

GRANAT BROS., a corporation,

Appellee.

GRANAT BROS., a corporation,

Appellant,

vs.

HERBERT BROWN and FEATURE RING CO., INC.,

Appellees.

Transcript of Record
IN FOUR VOLUMES

FILED
APR 5 1950
PAUL P. O'BRIEN, CLERK

Volume II
(Pages 87 to 414)

Appeals from the United States District Court,
Northern District of California,
Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

No. 12407 – 12408

United States
Court of Appeals
for the Ninth Circuit.

SAMUEL H. FRIEND, S. HERBERT FRIEND, LEONARD V. BLOCK, Co-Partners, Doing Business Under the Firm Name and Style of S. H. Friend, and Feature Ring Co., Inc.,

Appellants,

vs.

GRANAT BROS., a Corporation,

Appellee.

GRANAT BROS., a Corporation,

Appellant,

vs.

SAMUEL H. FRIEND, S. HERBERT FRIEND and LEONARD V. BLOCK, Co-Partners, Doing Business Under the Firm Name and Style of S. H. Friend and Feature Ring Co., Inc.,

Appellees.

HERBERT BROWN and FEATURE RING CO.,

Appellants,

vs.

GRANAT BROS., a corporation,

Appellee.

GRANAT BROS., a corporation,

Appellant,

vs.

HERBERT BROWN and FEATURE RING CO., INC.,

Appellees.

Transcript of Record
IN FOUR VOLUMES
Volume II
(Pages 87 to 414)

Appeals from the United States District Court, Northern District of California, Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

In the Southern Division of the United States District Court for the Northern District of California

Before: Hon. Dal M. Lemmon,
Judge.

No. 28219-H

GRANAT BROS., a corporation,

Plaintiff,

vs.

SAMUEL H. FRIEND, S. HERBERT FRIEND and LEONARD V. BLOCH, co-partners, doing business under the firm name and style of S. H. Friend,

Defendants.

No. 28220-H

GRANAT BROS., a corporation,

Plaintiff,

vs.

HERBERT BROWN, an individual,

Defendant,

and

FEATURE RING CO., INC.,

Intervening Defendant.

Appearances:

For the plaintiff
OSCAR A. MELLIN, ESQ.

For the Defendants
JAMES M. NAYLOR, ESQ., and
JOHN VAUGHN GRONER, ESQ.

PROCEEDINGS

* * *

JOSEPH GRANAT

called on behalf of the plaintiff, sworn.

* * *

Direct Examination

By Mr. Mellin:

Q. Will you give your name, age and residence, Mr. Granat? A. Joseph Granat.

Mr. Naylor: Pardon the interruption but may we go over to the jury box, your Honor?

The Court: You may.

A. I was born in 1886. I live in San Francisco, at 3435 Anza Street.

Q. What business are you in, Mr. Granat?

A. Manufacturing and retailing jewelry business.

Q. What firm are you associated with?

A. Granat Bros.

Q. Is that the plaintiff here? [4*]

A. Granat Bros.

* Page numbering appearing at top of page of original certified Transcript of Record.

(Testimony of Joseph Granat.)

Q. That is the plaintiff in this action?

A. Yes.

Q. And that is a corporation of California, is it, Mr. Granat? A. Yes.

Q. And was that the direct successor in interest of Granat Bros., a copartnership?

A. We were partners, and then we incorporated in 1927.

Q. And when did the Granat Bros., a copartnership, commence business in manufacturing jewelry in San Francisco? A. Well, we began in 1906.

Q. And your factory is where?

A. In San Francisco.

Q. And your factory is where?

A. In San Francisco.

Q. Yes. Your factory is located here?

A. Located here.

Q. And do you or do you not also maintain retail jewelry stores?

A. Retail jewelry stores.

Q. And where are they located, please, with reference to towns?

A. Two in San Francisco and one in Oakland.

Q. And what is the principal product which the Granat Bros. manufacture?

A. Engagement rings and wedding rings.

Q. And are those sold, those wedding rings and engagement [5] rings, solely through your retail stores?

A. Solely through our retail stores.

Q. And are they also sold in other States?

(Testimony of Joseph Granat.)

A. Yes, sir.

Q. And do Granat Bros. sell those directly or indirectly in other States?

A. Well, we sell them through the Granat Manufacturing Company.

Q. And the Granat Manufacturing Company is the fictitious name and style of L. A. Giacobbi and Company? A. Yes, sir.

Q. Now, there are two stockholders of Granat, of Granat Bros., isn't that correct, yourself and Mr. Leo Granat? A. That is correct.

Q. And the L. A. Giacobbi Company stock is owned jointly by—pardon me for leading him; I am trying to save time.

Mr. Naylor: Go right ahead.

Mr. Mellin: I know that that is not contended.

Q. ——Mr. Joseph Weinroth, yourself and Mr. Leo Granat? A. That is correct.

Q. Now, the L. A. Giacobbi Company is a corporation at present, is that so?

A. That is right.

Q. And they are the direct successor of the copartnership? A. That is correct.

Q. And that copartnership was yours, Mr. L. A. Giacobbi's, [6] Mr. Weinroth's and Mr. Leo Granat's? A. That is right.

Q. And that copartnership was a direct successor of the L. A. Giacobbi Company, which was a copartnership of two Giacobbis and Mr. Weinroth?

A. That is correct.

Q. Now, how long have you been selling your

(Testimony of Joseph Granat.)

rings outside of the local area through this Granat Manufacturing Company?

A. Oh, through the L. A. Giacobbi Company or the Granat Manufacturing Company?

Q. Well, the Giacobbi Manufacturing Company and their successor.

A. For at least 33 or 34 years.

Q. And they exclusively distribute your diamond rings manufactured by Granat Bros.?

A. That's right.

Q. And do you know the area over which they distribute your rings?

A. All over the United States.

Q. Now, commencing in the year 1934, what was the products which Granat Bros. manufactured at that time?

A. Engagement rings and wedding rings.

Q. Will you state whether or not you manufactured an engagement ring and wedding ring ensemble? That is, a set? A. Yes. [7]

Q. And you subsequently adopted the trade-mark "Wed Lok" for that set, is that correct?

A. That is correct.

Q. And when was that trade-mark adopted by Granat Bros.?

A. Well, either the latter part of 1933 or early in 1934.

Mr. Mellin: And, if your Honor please, may I tell the reporter that when I speak of "Wed Lok" in connection with Grant Bros. rings, it is spelled

(Testimony of Joseph Granat.)

"W-e-d-L-o-k," so that we don't have any confusion between the spellings.

Mr. Groner: How about a hyphen?

Mr. Mellin: Well, we use it with and without a hyphen.

Q. And will you state whether or not that trade-mark in any fashion was applied to rings manufactured and sold at that time? A. Yes.

Q. And in what fashion was it applied, if you know?

A. Well, we just—we were working up these ensemble rings, and we gave it the name "Wed Lok," gave it to some sets, the name "Wed Lok."

Q. By application of the trade-mark, Mr. Granat, I mean actually applying the trade-mark to the goods or to a label or a box. Was it applied in any fashion, the name "Wed Lok," to rings?

A. Oh, yes.

Q. In what way, please?

A. Well, many ways.

Q. Can you name them? [8]

A. You mean like applied to the ring, like marking the ring or boxes or advertising?

Q. Yes.

A. Well, all those things. We have used every method we could to apply it.

Q. Was the trade-mark at any time engraved in one of the rings, of the set itself?

A. Well, we stamped them with the name "Wed-Lok."

(Testimony of Joseph Granat.)

Q. Well, I beg your pardon. I didn't know the difference.

Mr. Groner: The defendant doesn't contest that phase of the matter, Mr. Mellin.

Mr. Mellin: Pardon?

Mr. Groner: The defendant makes no contest of that phase of the matter.

Q. (By Mr. Mellin): I hand you a set of a diamond ring ensemble, consisting of an engagement ring and a wedding ring, and will you tell me if you can identify that (handing to witness)?

A. That is one of our Wed Lok sets.

Q. And when was that design of Wed Lok set manufactured and sold?

A. That was one of our early sets. Personally, I couldn't just tell exactly the date, but it was one of our earlier designs.

Q. Could you approximately place the year? [9]

A. Well, let's see—oh, I wouldn't say—1938 or '39, along those years. I couldn't say exactly. We make different designs.

Mr. Mellin: I offer that in evidence, your Honor, that Wed Lok set in evidence, as Plaintiff's Exhibit A.

(The ring set referred to was received in evidence and marked Plaintiff's Exhibit A.)

Q. (By Mr. Mellin): I hand you a second set of diamond ensemble and ask you if you can identify these and tell us approximately when they were

(Testimony of Joseph Granat.)

manufactured and sold by the plaintiff (handing to witness).

A. Well, it was at least ten years ago, something like that. I can't tell you the exact date.

Q. And are they marked "Wed Lok"?

A. "Wed Lok," yes.

Q. And do you have other designations for your rings, such as series designations?

A. We give some of them names, others numbers.

Q. Do you recall what series or number that was (indicating)?

A. Well, we used to call this set a Wed Lok set, and then to identify it we would call it a Gondolier or give them numbers or something.

Q. What was the secondary identification? What was the purpose of that, Mr. Granat?

A. Well, just to identify it. Sometimes we used a name, other times a number. [10]

Mr. Mellin: May I offer this second set, identified by the witness, in evidence as Plaintiff's Exhibit B?

(The ring set referred to was marked Plaintiff's Exhibit B.)

Q. (By Mr. Mellin): I show you a third set, ensemble, of diamond ring, and ask you if you can identify it (handing to witness). A. Oh, yes.

Q. And what is it, please?

A. Well, we call this the "Interlocking" series. It was a series——

(Testimony of Joseph Granat.)

Q. And was it or was it not known under the trade-mark "Wed Lok"? A. Yes.

Q. And when, if you can tell us approximately, was that set manufactured and sold?

A. Well, we started to manufacture that type of ring about 1936 or 1937, something like that.

Mr. Mellin: May I offer that in evidence as Plaintiff's Exhibit C, your Honor?

(The ring set referred to was received in evidence and marked Plaintiff's Exhibit C.)

Q. (By Mr. Mellin): I hand you a fourth set, ensemble, and ask if you can identify it (handing to witness).

A. Well, this one here, this was a series, and we named this [11] the Nanette series.

Q. Was it known under the trade-mark "Wed Lok"? A. "Wed Lok," yes.

(The ring set referred to was received in evidence and marked Plaintiff's Exhibit D.)

Q. (By Mr. Mellin): And I hand you a fifth set and ask you to identify it (handing to witness). What is that, please?

A. That was a regular Wed Lok series. This one has a number. We designated this by a number.

Q. Now, with respect to all of these rings, are they being manufactured and sold by Granat Bros. at this time? A. Yes.

Q. And do you know whether or not they have

(Testimony of Joseph Granat.)

the word "Wed Lok" stamped within one of the rings of the set? A. Yes.

Q. And to your knowledge was or was not the word "Wed Lok" stamped into those sets at the time of the manufacture during the various periods with which we are concerned? A. Yes, sir.

(The ring set referred to was received in evidence and marked Plaintiff's Exhibit E.)

Q. (By Mr. Mellin): Will you state whether or not the Granat Bros., because of their retail business, did any advertising of their diamond ring ensembles which you have designated as "Wed Lok"?

A. Yes.

Q. And what sort of advertising was that for the retail store, Mr. Granat?

A. Newspaper mainly.

Q. And can you recall offhand what papers?

A. The Examiner, mainly; we had, I think we advertised them in the Call, the Daily News, but mainly the Examiner.

Q. I hand you a bound volume of what appears to be individual ads; that is, photostatic copies of full-page ads of newspapers, showing advertisements thereon, and I ask you if you can identify them (handing to witness).

A. I can, yes.

Q. And I call your attention first to the ad here and ask you if you would read into the record the date of it, please. A. If I——

Q. Can you read the date that is given thereon?

(Testimony of Joseph Granat.)

A. August 5. Is that the date? August 5, 1934.

Q. That is correct. And all of these ads, to your knowledge, appeared in the local papers?

A. Yes, sir.

Mr. Mellin: May I offer that group of copies of advertisements of "Wed Lok" ensembles in evidence?

The Clerk: Plaintiff's Exhibit F.

(The copies of advertisements were received in evidence and marked Plaintiff's Exhibit F.)

Q. (By Mr. Mellin): By the way, Mr. Granat, how did you happen to adopt the word "Wed Lok" for this ring?

A. Well, I heard the name mentioned in a wedding ceremony. I was at a wedding and heard the name in the ceremony.

Q. At any time during the period from 1934 to the present time did you—and you are manufacturing these rings at the present time, isn't that so?

A. Manufacturing them now. [13-A]

Q. Now did Granat Bros. at any time discontinue the manufacture of Wed Lok rings?

A. Never discontinued them, no, sir.

Q. And during the war, the late World War, did you still manufacture and sell Wed Lok rings?

A. We did, yes.

Q. And, say, during the years of the war, was the production and sale of Wed Lok rings—how would you compare it in volume to, say, prior to the war and subsequent to the war?

(Testimony of Joseph Granat.)

A. Well, our production fell off, but I think the relationship is there, Wed Loks to regular production.

Q. Would you know in round figures of money the retail sales of rings which were marked and sold as Wed Lok in your retail stores from the year 1934 to the present? Do you have a note of that?

A. I do; approximately $2,000,000 worth.

Q. That is, of Wed Lok rings, marked and sold as Wed Lok ensembles? A. Yes.

Q. I show you page 86 of the July issue of the Pacific Goldsmith, and call your attention to an ad appearing thereon (handing to witness); and I ask you if you saw that ad? A. Yes, sir.

The Court: You said July issue; what year?

Mr. Mellin: I beg your pardon, your Honor; 1948.

Q. And is that trademark of which Granat Bros. complained here, [14] "Feature Lock"?

A. Yes.

Mr. Mellin: May I offer that in evidence, your Honor, that page, as Plaintiff's Exhibit next in order?

The Clerk: That will be G.

(Magazine page from Pacific Goldsmith referred to above was thereupon received in evidence and marked Plaintiff's G.)

Mr. Mellin: And I show you a tear sheet——

Mr. Naylor: Just one page?

Mr. Mellin: Yes.

(Testimony of Joseph Granat.)

Q. I show you a tear sheet of the Salinas Californian, dated Friday, July 16, 1948; and I call your attention to an ad by Herbert Brown, credit jeweler, and ask you if you have seen that advertisement (handing to witness). A. Yes.

Q. And does that display the trademark of which you are complaining here, "Feature Lock"?

A. Yes, sir.

Mr. Mellin: May I offer that tear sheet?

Mr. Groner: May I see it first?

Mr. Mellin: I beg your pardon. I offer that tear sheet as Plaintiff's next in order, your Honor.

The Clerk: Plaintiff's H.

(Tear sheet of Salinas Californian referred to above was thereupon received in evidence and marked Plaintiff's Exhibit H.) [15]

Q. (By Mr. Mellin): I show you the issue of Jewelers' Circular Keystone of May 8, 1948, and I call your attention to an advertisement appearing on page 68 and ask you if you have seen that before (handing to witness)? A. I have.

Q. And is that a use of the trademark, "Feature Lock," that you are complaining of?

A. Yes.

Mr. Mellin: Now I offer that page in evidence as Plaintiff's next in order.

Mr. Groner: May I see it? What is the date?

Mr. Mellin: I am sorry, May 8, 1948.

The Clerk: Plaintiff's I.

(Testimony of Joseph Granat.)

(Page 68 of May 8, 1948, issue of Jewelers' Circular Keystone referred to above was thereupon received in evidence and marked Plaintiff's Exhibit I.)

Q. (By Mr. Mellin): Now I show you pages 34 and 35 of the November issue, November 1948, of the Jewelers' Circular Keystone, and ask you if you have seen that ad as that appeared (handing to witness)? A. Yes.

Q. And that shows the name, "Feature Lock," of which you are complaining? A. Yes, sir.

Mr. Mellin: I offer those two pages in evidence, if your [16] Honor please, as Plaintiff's next in order.

The Clerk: J.

(Pages 34 and 35 of November 1948 issue of Jewelers' Circular Keystone referred to above was received in evidence and marked Plaintiff's Exhibit J.)

Q. (By Mr. Mellin): I hand you what appears to be a soft copy of registration trademark, registration No. 430436, to Granat Bros., with the trademark, "Wed Lok," and ask you if that is the copy of the registration? A. Yes, sir.

Mr. Mellin: May I offer that in evidence as Plaintiff's next in order, your Honor?

The Clerk: Exhibit K.

(Soft copy of registration No. 430436 re-

(Testimony of Joseph Granat.)

ferred to above was received in evidence and marked Plaintiff's Exhibit No. K.)

Q. (By Mr. Mellin): Now, Mr. Granat, during your deposition, you testified as to the purchase of two trademark registrations. One is No. 85365, "Wedlock," W-e-d-l-o-c-k, one word; and "Wedluck," trademark registration No. 1411415, and I show you copies of those registrations, and ask if those are the two you purchased (handing to witness)? A. Yes, sir.

Mr. Mellin: Shall I put in the proving papers?

Mr. Groner: We do not admit title to the early one.

Mr. Mellin: All right. [17]

The Clerk: Pardon me, are you offering those in evidence?

Mr. Mellin: Yes, next in order; what are the numbers, Mr. Clerk?

The Clerk: "Wed-luck" will be L, and "Wedlock" will be M.

(Registration certificates "Wed-luck" and "Wedlock" referred to above were thereupon received in evidence and marked Plaintiff's Exhibits L and M respectively.)

Q. (By Mr. Mellin): Will you tell us something about the purchase of the trademark "Wedlock" from Strauss & Strauss, Mr. Granat?

A. Well, we knew he owned the "Wedlock," the

(Testimony of Joseph Granat.)

trademark "Wedlock," and we purchased it from them.

Q. Had you used the word "Wed Lok" before you knew of the Strauss & Strauss registration?

A. Yes, sir.

Q. And when you learned of that, what did you do?

A. Well, we purchased it; we made an attempt to purchase it and they sold it to us.

Q. Now I show you what appears to be a document labeled "Assignment and transfer of trademark" and which is dated the 12th day of March, 1936, and I ask you if that is the paper upon which you base title to that registration of "Wedlock"?

A. That is correct.

Mr. Mellin: May I offer that next in order, your Honor?

The Clerk: N. [18]

(Assignment and transfer of trademark dated March 12, 1936, referred to above was then received in evidence and marked Plaintiff's Exhibit N.)

Q. (By Mr. Mellin): And I also hand you a document labeled "Assignment of registered trademark, trademark "Wed Lok," and ask you if that is the document upon which you base your claim to ownership of the registration of the trademark "Wed Lok"? A. That's right.

Q. And what was the purpose of it? You had

(Testimony of Joseph Granat.)

been using the name "Wed Lok" as a trademark since 1934; what were the circumstances that led you to purchase these marks and the reason for it, if you will tell the court, please?

The Clerk: O.

(Assignment of registered trademark for "Wed Lok" referred to above was thereupon received in evidence and marked Plaintiff's Exhibit O.)

The Witness: Well, I stopped at the owners—I purchased it—I didn't want to infringe on something that I didn't own.

Q. Had you known of these marks or the use of them, before? A. Never.

Q. Before you learned of the registrations?

A. Never.

Q. Had you ever seen any wedding rings or engagement ring ensembles marked with those trademarks before you adopted your mark? [19]

A. No.

Mr. Mellin: That is all.

Cross-Examination

By Mr. Groner:

Q. Mr. Granat, you testified that you adopted the trademark "Wed Lok" because you had heard that expression used in a wedding ceremony?

A. That is correct.

Q. Was that the only reason you adopted it?

(Testimony of Joseph Granat.)

A. Well, we had rings that we felt that the name fitted, ensemble rings that we were making.

Q. What do you mean, "the name fitted," Mr. Granat?

A. Well, it was appropriate, I would say.

Q. Was it not descriptive, Mr. Granat?

A. Not necessarily.

Q. I am not sure I understand your meaning, "not necessarily." Wasn't the word "Wed Lok"—wait until I finish, please—wasn't the word "Wed Lok" descriptive of the type of ring that you were making and selling commencing in 1934, and extending with some interruptions up until today?

A. We had rings that fitted together. They sort of cling together, and the name was appropriate.

Q. And the name described the function of those particular rings, did it not?

A. Not necessarily.

Q. Didn't those rings interlock? [20]

A. They did not; they fitted; they did not interlock.

Q. Didn't you use the expression that they "interlocked"? A. Yes, we used the expression.

Q. Didn't you constantly and reiteratedly use the expression that they interlocked?

A. We did in our ads, yes.

Q. Well, now, I am going to refer you to several of those ads.

Mr. Groner: I apologize to your Honor for taking so long, but there are a great many of these

(Testimony of Joseph Granat.)

things, and it is somewhat difficult to find our way around.

Q. (Continuing): Do you recognize as one of the ads of Granat Bros. (handing to witness)?

A. Yes.

Mr. Groner: I am pointing now, if it please your Honor, to Defendant's Exhibit 47, introduced during the taking of the San Francisco depositions. I assume it is duplicated in that list you have, but I have no possible means of cross-referencing.

Q. Now, Mr. Granat, I call your attention to this expression, and I am quoting from the advertisement, "The rings interlock, as it were, but this is due to design features, and is in no way dependent upon any special mechanical device. The idea suggested the name 'Wed Lok,' and by this name the rings already are known from coast to coast."

Is that a correct statement of the facts?

A. Yes. [21]

Q. Now you have, since that date—and incidentally, that was November 1, 1936—used the word descriptively, have you not, Mr. Granat?

A. Yes, sir.

Mr. Mellin: Just a moment; your Honor, I object to that question, "used the word descriptively" in what sense? Certainly they have used the word descriptively in their advertisements. I mean, the word "lock" and "interlock" and "locking." Now that is a question of law that this court has got to decide, not this witness.

(Testimony of Joseph Granat.)

The Court: I think so.

Q. (By Mr. Groner): Isn't it the fact, Mr. Granat, that you have used the word "Wed Lok" as synonymous with "interlocking" or "lock-engaging" wedding and engagement rings?

A. We have used it for rings that interlocked or fit together or cling together.

Q. And you haven't used it for any other purpose, have you, Mr. Granat?

A. What do you mean by "any other purpose"?

Q. You haven't used it for any rings that did not interlock, have you?

A. I can show you by exhibition, if you want me to show you, and see whether they——

Q. Just answer my question, Mr. Granat; I asked you—— A. Well—— [22]

Q. What is your answer to that question that I asked you?

The Court: What is your answer to the question, then, Mr. Witness?

The Witness: Well, if I can tell you by—let's see if I can——

(Mr. Groner handed exhibits to witness.)

The Witness: I am not mechanical. Here is a ring, a very popular ring, the "Nanette" series. You see, you just (indicating)—I don't know what you can call them. You can call them interlocking.

Q. (By Mr. Groner): You have called them interlocking, have you not, Mr. Granat?

A. Yes, I have called them that. Here the rings

(Testimony of Joseph Granat.)

are; they don't necessarily lock, or they don't interlock. We call them interlocking, yes, we did.

Q. And the advertisements have constantly referred to them in a descriptive sense, have they not, Mr. Granat? A. Oh, yes.

Q. Now I should like to refer you for just a moment—do you know Mr. Giaccobi?

A. I knew him.

Q. In Portland, Oregon?

A. Oh, in Portland, Oregon—yes, that is correct.

Q. Is he a customer of the plaintiff here?

A. Yes. [23]

Q. You normally furnished your customers with advertising mats, did you not?

A. That is correct.

Q. I hand you a photostat of Plaintiff's Exhibit Giaccobi 23 (handing to witness) and I ask you if you have ever seen that before.

A. That is not our ad. I don't know whether I have seen it or not, this particular ad.

Q. It is the ad of your customer, M. Giaccobi, is it not? A. Yes.

Q. And it is an advertisement of Wed Lok rings, manufactured by Granat Bros., is it not?

A. Yes.

Q. Have you seen that particular format?

A. I can't say.

Q. Did you authorize Mr. Giaccobi to place ads of that type?

A. He could if he bought our rings, and he advertised them.

(Testimony of Joseph Granat.)

Q. Now the statement appears in that advertisement: "These are the rings that Wed Lok together."

Is that a correct statement?

A. That is his statement.

Q. Isn't it a correct statement of the facts?

A. That is his statement.

Q. I asked you if it isn't a correct statement of the facts.

A. That is his statement. I don't know. We let these fellows—— [24]

Q. Is it in any sense incorrect, Mr. Granat?

A. Let's see that again. I don't know. That is his affair. I have nothing to do with his ad.

Q. Don't you furnish that to him, don't you furnish those mats?

A. Well, he changes them. We don't—this is not our mat. He changes them around. He does anything he wants to with them. I don't know about his advertising business.

Q. Isn't that advertisement perfectly consistent with various other advertisements which Granat Bros. has issued?

A. I don't follow his ads. We give them certain terms, and sometimes they use them, sometimes they use all of them, and sometimes they don't. They can do anything they want with them. I am not his advertising manager. They can do anything they want with them.

Q. I asked you if it is—his advertisement—

(Testimony of Joseph Granat.)

perfectly consistent with the other advertisements issued by Granat Bros.

A. I don't know. I don't know what you are driving at.

Q. It is perfectly simple what I am driving at; unless we misunderstand each other, I am driving at showing this, that Granat Bros.' use of the word "Wed Lok" has never been anything but descriptive. Now do you controvert that statement or will you admit it?

A. Well, I don't know; I don't know what——

Q. Isn't it the fact that from the very inception, Granat Bros. had used the word "Wed Lok" descriptively? [25]

Mr. Mellin: If your Honor please, what this term "descriptive" is, is a question of law, and under the circumstances, all of the advertisements are going into evidence.

The Court: Yes, I think so.

Mr. Mellin: And I object to this argument with the witness as to what it means, the meaning of the word "descriptive" in a legal viewpoint; that is improper, and I strenuously urge that objection.

The Court: Yes.

Q. (By Mr. Groner): Mr. Granat, you have introduced here as Defendant's—or Plaintiff's Exhibits (excuse me)—A to E, five types of Wed Lok rings, is that correct? A. Yes.

Q. And you personally took out patents on those types, didn't you?

(Testimony of Joseph Granat.)

A. No, I took out the patent—we bought the patent. We bought the Wed Lok patent.

Q. I am not talking about trademarks, Mr. Granat. I am talking about the patents. You took out letters patent in the U. S. Patent Office for the different designs which you have shown in Plaintiff's Exhibits A through E, isn't that correct?

A. We took out——

Q. Not "we"—you.

A. All right, I took out probably two patents, two or three of them. I don't know. [26]

Q. Well, now, I hand you a patent issued to Joseph Granat, No. 1982864, and ask you if you are not the Joseph Granat who is the patentee there (handing to witness).

A. That is correct.

Mr. Mellin: If your Honor please, I don't see the materiality of this. There is no question but that some of these rings are patented, and we don't contest that. I don't see the materiality, whether they are patented or unpatented, as far as whether the trademark "Wed Lok" is infringed or pirated, by the word "Feature Lock." I don't see the materiality of that. That has no reference to the trademark.

Mr. Groner: Well, if it please your Honor, of course this is not a patent suit; there are no patents directly involved, and they are collateral. However, I expect to show by these patents, taken out in the name of this witness, the word "locking"

(Testimony of Joseph Granat.)

and "interlocking" is constantly used in the descriptions of the structure shown in Exhibits A through E, and thus buttress my contention that the words are used solely descriptively.

Mr. Mellin: If your Honor please, we will stipulate on the record that in the body of the ads the rings are described as "locking together" and "interlocking" and so they do in the patents. We are raising no objection to such a description in the ads of the pirating defendant. All we ask—and we say under the Miracle Whip case, that there should not be used in a [27] trademark sense, as we have used "Wed Lok."

Now we have no objection—there is no issue here—that some of these rings don't lock together mechanically. We agree to that. We have no objection to this defendant or anyone else describing their rings in the body of the advertisement or in any other fashion, as interlocking or locking together or having a lock. That is not at issue. We have no objection. All we are objecting to is the use of the word "lock" in combination with another letter in a trademark sense, under the authorities.

The Court: The objection is overhauled. The admission you have just made is sufficient. [28]

The Court: The objection is overruled. The ad-admission just made sufficient?

Mr. Groner: Substantially, may it please your Honor. For the purpose of the brief and belaboring

(Testimony of Joseph Granat.)

the question further I should like to introduce these four patents.

The Court: They will be received.

Mr. Groner: As Defendants' Exhibit No. 1, Groner patent No. 1982864.

(The patent referred to was received in evidence and marked Defendants' Exhibit 1.)

Mr. Groner: As Defendants' Exhibit No. 2, Granat Patent No. 2016492.

(The patent referred to was received in evidence and marked Defendants' Exhibit 2.)

Mr. Groner: As Defendants' No. 3, Granat Patent No. 2059228.

(The patent referred to was received in evidence and marked Defendants' Exhibit 3.)

Mr. Groner: And as Defendants' Exhibit No. 4 Granat Patent No. 2061655.

(The patent referred to was received in evidence and marked Defendants' Exhibit 4.)

Mr. Groner: I mention in connection with these, if it please your Honor, that each one of them refers to the interlocking or locking of the two rings together. [29]

Q. Now, Mr. Granat, you testified you did file a registration, No. 43046, for "W-e-d hyphen L-o-k"—no, please delete the hyphen; that is not in the registration. That is correct, is it not?

A. Let me see it.

(Testimony of Joseph Granat.)

Q. That registration to which I refer is Plaintiffs' Exhibit K. You personally signed the petition which accompanied that application, did you not, Mr. Granat? A. That is my signature.

Q. And you also signed the statement that accompanied that application, did you not?

A. That is my signature.

Q. And you also signed the declaration?

A. That is my signature.

Q. Now, I point to the petition which you signed and I call your attention to the fact that you there requested that the name, the trade-mark, together with the accompanying statement and declaration may be registered in the United States Patent Office in accordance with the Act of February 20, 1905. That was originally there when you signed that? A. There is something——

Q. Yes, I am coming to that.

A. This March 20, 1920——

Q. I understand.

A. Yes, both, I signed; one was crossed out. [30]

Q. Exactly. But it was written in accordance with the Act of February 20, 1905?

A. It was crossed out and then there was something else——

Q. Yes, I understand.

A. Well, that is it.

Q. Now, you followed the prosecution of that application, did you not?

A. What do you mean by that?

(Testimony of Joseph Granat.)

Q. Well, you talked to your attorney about it?

A. Well, they know more about it than I do.

Q. Yes, I understand. That is why you businessmen have to put up with us. But aside from that—I hope I haven't finished yet, Mr. Granat—you followed the prosecution of that application?

A. I don't know. I signed it, the attorney handed it to me, he OK'd it and I signed my name. I don't know the contents of it.

Q. But you thereafter followed what happened, didn't you?

A. I don't know. We just went along and manufactured rings. I am not an attorney. That is why I hired an attorney.

Q. When the attorney filed it in the Patent Office didn't he tell you about it?

A. I suppose he did. He must have.

Q. Didn't he tell you—and this appears as page 5 of what I shall introduce as Defendants' Exhibit No. 5—didn't he tell [31] you that the Patent Office had refused to register the mark under the Act of February 20, 1905, on the ground that it was descriptive of the goods?

A. I don't know anything about it.

Q. Did he show you a communication like that?

A. He might have. I can't remember these things. I don't know.

Q. Did you authorize him thereafter to file an amendment in the Patent Office in this proceeding?

(Testimony of Joseph Granat.)

A. If he did I must have authorized him. I don't know.

Q. ——taking the thing out from under the Act of 1905 and putting it under the Act of 1920? There is the—(exhibiting document to witness).

A. I don't remember the document. I went according to my attorney's advice, whatever he told me——

Q. You authorized your attorney to take this action, did you not?

A. Whatever he did, he recommended it and I agreed to it.

Mr. Groner: I should like to introduce, may it please your Honor, the file history of this registration as Defendants' Exhibit 5.

The Court: It will be received.

(The file history referred to was received in evidence and marked Defendants' Exhibit 5.)

Mr. Groner: Further showing, may it please your Honor, [32] there has been only descriptive use.

Q. Now, Mr. Granat, you testified, I believe, that the trademark "Wed Lok" from the time of its adoption in 1934 by Granat Bros. had never been discontinued, isn't that your testimony?

A. The manufacture of rings—yes, we have used it continuously.

Q. Now, maybe you are being a little technical on this, Mr. Granat. A. Technical?

Q. Has Granat Bros. or Granat Manufacturing

(Testimony of Joseph Granat.)

Company, and for the purpose of this case we will consider them as one, have they continuously marketed any product under the name "Wed Lok" continuously from 1934 to date? A. Yes, sir.

Q. Mr. Granat, didn't you some time after you started manufacture in 1934 discover that Strauss & Strauss—— A. That is correct.

Q. ——had the word—— A. Yes.

Q. ——and you discontinued the use of it——

A. Yes.

Q. ——and that discontinuance lasted for over a year?

A. For a certain amount of time; you are right on that, yes. When we found out that someone else owned it, we discontinued it.

Q. So you discontinued the use for over a year?

A. I don't know the length of time.

Q. About a year after you started using it?

A. Until we bought it.

Q. So your earlier statement is incorrect in that, isn't it?

A. It is incorrect—I don't know—he went back to——

Q. Isn't that a second hiatus in the use of "Wed Lok"?

A. You are using a pretty fancy word there. I don't know——

Q. All right. Isn't that a temporary discontinuance of the use?

A. No, sir, not since then.

(Testimony of Joseph Granat.)

Q. Didn't you discontinue to sell and advertise rings bearing the mark "Wed Lok" between 1940 and 1947?

Mr. Mellin: Just a moment——

A. We continuously used the word "Wed Lok"——

Mr. Mellin: Just a moment. I object to that as being a compound question, your Honor. They did discontinue the advertising during the war, but did not discontinue selling.

The Witness: We kept on selling——

Mr. Groner: All he has to do if he doesn't understand the question is say so. I ask the witness to give me an answer. It seems to me he can answer that question.

The Court: Overruled.

A. Yes, "Wed Lok" has been continuous. We have used it continuously except that one period when I found someone owned it, and we didn't use it until we bought it, the Wed Lok ring. [34] Since then we have used it continuously.

Q. (By Mr. Groner): Didn't you discontinue and entirely cease selling Wed Lok between 1940 and 1947?

A. I believe we did not push the sale of Wed Lok during that period.

Q. You didn't advertise it at all, did you, Mr. Granat?

A. I don't know. I don't think we did. We might or might not.

(Testimony of Joseph Granat.)

Mr. Groner: Mr. Mellin, was there any advertising in that period?

Mr. Mellin: There is no advertising, your Honor, between the start of the late World War and about the end of 1946, when they started—we admit there were no advertisements by Granat Bros. of Wed Lok rings during the war, there was no advertising during that period, but there was production and sale of Wed Lok rings. There is no contest there was any advertising.

The Witness: We might have advertised not in the Examiner. We advertised, I believe, in programs, but not in the Examiner.

Q. (By Mr. Groner): Will you produce any such advertisement, Mr. Granat?

A. I will try to locate them if I can.

Q. Were you not during the time when you were on deposition several months ago asked to do just that? A. Well, if I was—— [35]

Q. You haven't done it, have you?

A. I don't know whether I was asked or not. I can't remember. Have you got it down there and made a note of it, or something? I don't know.

Q. We asked the plaintiff to produce all advertising. A. The plaintiff?

Q. Yes, the plaintiff, and I don't know what is in that exhibit, but up to now nothing has been produced for us.

A. Well, I will look around. Maybe I can find you a few of those.

(Testimony of Joseph Granat.)

Q. For the period from 1940 to the spring of 1947. A. We will look around.

Q. Well, as a matter of actual fact, you did not advertise before the war, did you, Mr. Granat?

Mr. Mellin: May I suggest you ask Mr. Granat to divide the retail business from the wholesale business? There is a difference.

Mr. Groner: Mr. Granat can do that. I don't know whether he wholesales or retails or does one or the other.

The Court: You may answer.

A. I don't know. I think we cut down on our Wed Lok advertising during the war, maybe before the war, but regarding the wholesaling end of it, I don't know just how much was done.

Q. (By Mr. Groner): But you have no advertisement to show between the period at least a year before the outbreak of the [36] war, or the outbreak so far as it concerned the United States, and the spring of 1947, isn't that correct?

A. Well, I don't know—no newspaper advertising, Examiner advertising.

Q. Now, what was it that impelled you to diminish, if not terminate, your manufacture during this period, Mr. Granat?

A. Well, we lost a lot of help in our factory, and we could sell most anything we made—we sold the easier rings to make. Anything we made were salable.

Q. And even beyond that wasn't there another

(Testimony of Joseph Granat.)

reason why Wed Lok went into obscurity?

A. I don't know. You may know it. I don't know.

Q. Is it a fact that you ceased or diminished manufacture primarily because that type of ring became unpopular? A. Not necessarily.

Q. I don't know what that word means, Mr. Granat.

A. I don't know what some of your words mean either.

Q. You can stop me——

A. I will stop you.

Q. ——and I will fill in and fix it so you will understand, and I would like you to do the same for me. Now, would you mind giving me some other answer than "Not necessarily"?

A. Well, we kept making rings right along, Wed Lok rings at certain times. Around during the war and maybe a little before the war we did cut down our production of everything, not only Wed Lok but of everything, and the ones we did make were the [37] rings easier to make.

Q. Is it a fact that in the pre-war period the Wed Lok type of ring was becoming less popular?

A. It was not.

Q. And it was for that reason that you either diminished or ceased manufacture?

A. That is not so, that is not so.

Q. That is not? A. No.

(Testimony of Joseph Granat.)

Q. Didn't you testify in this matter before my deposition, Mr. Granat?

A. Testify to what? What did I say?

Q. I am going to read it to you in just a minute. Well, didn't you testify in this matter by deposition, Mr. Granat, some months ago?

A. Yes.

Q. And didn't you testify this—you were asked, "Was there any advertising of Wed Lok rings in the years 1941 to 1946 inclusive?" and your answer appears to be this: —and I will ask you if that is correct. "I believe that in—" and then you paused and said, "Let's see, there was the tendency to the narrower type of ring and we had to change our tool dies and equipment to produce that style of narrower ring." Isn't that your testimony?

A. Well, what about it? [38]

Q. Isn't it the fact?

A. That didn't stop us making the other rings.

Q. What do you mean, the other rings?

A. Wed Lok rings.

Q. You were giving an explanation at this time, Mr. Granat, as to why there was no advertisement. Now, didn't you mean by that statement that Wed Lok rings had become unpopular?

A. No, sir.

Q. What did you mean?

A. The style of the ring——

Q. The style of the ring had become unpopular?

A. The style changed.

(Testimony of Joseph Granat.)

Q. You had to retool?

A. We had to make others.

Q. When you retooled did you retool for Wed Lok?

A. I don't know what you mean.

Q. Just what I said. Didn't you retool for other types of rings and not for Wed Lok? Isn't that the fact?

A. I still don't know what you are driving at.

Q. All you have to do is answer the question. Mr. Reporter, will you read it back to him?

Mr. Mellin: By "other types of rings," Mr. Groner, do you mean rings other than Wed Lok?

Mr. Groner: That is exactly what I mean.

Mr. Mellin: Well, the witness wants to know.

A. We make up other rings than Wed Lok. We made all our designs so as to change to the narrower construction, not only Wed Lok but the other rings, too. There was a style change. We had to stop making wide rings and make more fancy rings.

(Recess.)

Mr. Groner: For the record, may I note that the excerpt from Mr. Granat's testimony which I just read appears on page 114 of the San Francisco depositions.

Q. Now, Mr. Granat, bearing on the same general question, isn't it the fact that in the year 1939 Granat Bros. placed only four local newspaper advertisements of Wed Lok?

A. I don't know the number.

(Testimony of Joseph Granat.)

Q. Didn't you testify as to four?

A. I did.

Q. In the prior testimony?

A. I guess I did. They showed me the ads, and I testified—but I can't remember the number.

Mr. Groner: I may note, if it please your Honor, that I checked during the recess on Plaintiff's Exhibit F, and I find that there are but four advertisements there.

The Witness: Four Examiner advertisements, I believe, or whatever I said. There may have been others.

Q. (By Mr. Groner): You didn't produce them, any others?

A. No, I didn't. Maybe I should. Maybe I will get them. I don't know. [40]

Mr. Mellin: Just a moment, Mr. Groner. I beg your pardon. May we, in order that the Court won't be confused, make this statement: We are dividing them up. These are local retail ads, for the retail stores. That doesn't mean that there are no advertisements during that year nationally. That was handled by a different group. So what he is now testifying to, as I understand it, is purely local retail that he knows about. He doesn't know about national advertising.

Mr. Groner: May I ask your Honor's indulgence for just one moment?

(Pause.)

(Testimony of Joseph Granat.)

Q. (By Mr. Groner): Mr. Granat, you haven't produced any evidence in this case of any more than four local newspaper advertisements during the year 1939, have you?

A. Well, whatever they showed me at the time. At the time of the deposition they showed me four ads, and I said they were produced, that we produced them.

Q. Now, during the earlier depositions, Mr. Naylor said, "According to our count, Mr. Granat, there were four ads in 1939 relative to Wed Lok rings." A. In that particular——

Q. Excuse me just a moment.

A. Go ahead.

Q. And then Mr. Naylor said, "Were you advertising other things in that year?" and you asked, "What do you mean, other [41] things? Other diamond rings?" He said, "Yes." And your answer then is, "Yes." A. That's right.

Q. Now, in the year 1940, you testified earlier, did you not, that there were but eight advertisements? A. I believe so.

Mr. Groner: Well, I may note for the record, if it please the Court——

The Witness: The advertisements——

Mr. Groner: Excuse me just a moment, Mr. Granat.

The Witness: All right.

Mr. Groner: I should like to state, if it please the Court, that I checked the records during the

(Testimony of Joseph Granat.)

recess and find that there were probably eight different ads which appeared a total of eleven times, so I would like the record to show that those additional three times don't show.

The Witness: So you can't tell. It may have been more. You can't tell.

Q. (By Mr. Groner): Now, Mr. Granat, you testified in direct to some acquaintance, anyway, with Jewelers' Circular Keystone. You identified an ad from that; you are familiar with that magazine, arent' you? A. Yes, sir.

Q. And you have been for many years, isn't that correct? A. Many years, yes. [42]

Q. It is probably one of the two or three leading trade magazines? A. That is right.

Q. Are you familiar with the book which the concern periodically issues, entitled "Trade Marks, Jewelry and Kindred Trades"?

A. Well, I know the term. I am not familiar with the trademarks or anything.

Q. You are familiar with that book, aren't you?

A. Yes.

Q. Now, isn't it the fact that in formulating that book they write to the various jewelers and ask them to supply Keystone with the trade-marks of that particular house? A. That is correct.

Q. That is correct, isn't it?

A. I believe they do that. That is their affairs. I don't know.

Q. And they wrote Granat Bros., didn't they?

(Testimony of Joseph Granat.)

A. Probably. I don't know whether they did or not.

Q. Now, I call your attention to the fact that this book, page 50 of which, with the frontispiece, has heretofore been introduced in evidence as Defendants' Exhibit 110, on page 3 is the statement: "Trade-Marks of the Jewelry and Kindred Trades, Fifth Edition, 1943." Just about halfway through the period we have been speaking of. And then it goes on: Illustrations and reproductions of the marks, registered and unregistered, used by manufacturers, wholesalers and importers [43] of jewelry, sterling silverware, silver plate ware, watches, watch cases, watch attachments, precious, semi-precious and imitation stones, clocks, fountain pens, and so forth."

That aims to be a complete statement of all trademarks used in the jewelry trade; is that correct, Mr. Granat? You are acquainted with that, are you not?

A. Well, I guess they aim to get certain information, yes. It is a private enterprise. It is nothing——

Q. With which, however, the various jewelers operate, isn't that correct?

A. They don't have to.

Q. No. Granat Bros. did, though, didn't it?

A. I don't know. Maybe it did and maybe it didn't.

Q. Well, I hand you now the book, and I point

(Testimony of Joseph Granat.)

to page 50 (handing to witness), and ask you if you see any statement there as to Granat Bros. trade-marks.

A. Some of them. This is the wholesale end of it, yes.

Q. Granat Bros. has no wholesale end, has it, Mr. Granat?

A. Well, they might have—this is 150 Post Street. This is the manufacturing, wholesale end of the thing.

Q. It is signed "Granat Bros.," isn't it?

A. They did. They signed it "Granat Bros." I don't know——

Q. Now, would you mind reading off the trade-marks of Granat Bros. which appear there?

A. "Standard Set, Buttercup, Coronet, Finger Bracelet, Hobby [44] Bracelet, Parisian Knot, and Rounded Square."

Q. No Wed Lok there, is there, Mr. Granat?

A. What of it?

Q. Answer my question.

A. I don't see Wed Lok there, no.

Q. It isn't there, is it?

A. No. You don't have to bark at me, though.

Q. Now, during this same period, your various customers were not able to get Wed Lok, were they, Mr. Granat?

A. There are two divisions. Wholesale and retail. That has to do with—I know my retail customers got Wed Loks, all the way through. I know

(Testimony of Joseph Granat.)

we manufactured them for the wholesale division. What they did with them, I don't know, at that time.

Q. Have you got any evidence of retail sales during this period? A. Lots of it.

Q. Will you produce them, please?

A. We can produce evidence.

Q. Now, with the wholesale customers, were they able to get any Wed Lok rings during this almost seven-year period? A. Between when?

Q. 1940 and the spring of 1947.

A. Certainly.

Q. You say they did?

A. They did, yes. [45]

Q. Did your customers, your customer Jackson of Salem, Oregon, get any during that period?

A. How do I know?

Q. I want an answer, Mr. Granat.

A. I don't know.

Q. He testified that he was unable to get them. Do you think he was incorrect?

A. I don't know anything about the wholesale division.

Q. Do you think he was incorrect?

A. I think he was incorrect.

Q. You are a partner in the wholesale division, aren't you? A. I am now.

Q. And you were in 1940 to 1947, weren't you?

A. We have been partners—no, not 1940 to 1947.

Q. Did you have nothing to do with the wholesale division during that period?

(Testimony of Joseph Granat.)

A. Just as suppliers of merchandise of our—I don't know when. I would have to get some information. I don't know when this—Let's see if I have it here now (consulting notebook). The partnership—I don't know when we formed that partnership. As far as the wholesale division was concerned—— [46]

Q. Wasn't there another partnership in which you were a member which preceded the present one? A. Not that I know of.

Q. Haven't you been a member of the partnership of Granat Manufacturing Co. since before 1940? A. A partner?

Q. Yes.

A. I wasn't a partner in the Granat—in the L. A. Giaccobi setup. I don't know what you are talking about now.

Q. Haven't you been a member in Granat Manufacturing Co. since early in 1940? A. No.

Q. When did you first become a partner in that?

A. I haven't got the date. I can get it for you.

Mr. Mellin: As a matter of fact, that is a corporation.

Q. (By Mr. Groner: Well, whether it would be a corporation or a partnership, you were either an officer of the corporation—— A. In 1940?

Q. ——or a member of a partnership since before 1940 continuously until the spring of 1947; isn't that correct? A. No.

(Testimony of Joseph Granat.)

Q. You had nothing to do with Granat Manufacturing Co. during that period?

Mr. Mellin: What period?

A. Not up to a few years ago, a couple of years ago. [47]

Q. (By Mr. Groner): Would you furnish us with the exact information as to that, Mr. Granat?

A. I will, yes.

Q. Now are you acquainted with your customer, Harley G. Jackson? A. No, sir.

Q. Are you acquainted with the fact that that witness, a witness for the plaintiff, by the way, testified as follows in his deposition where he was asked: "Were you able to procure from him—" the Granat salesman at that time, 1947—"Wed Lok ensembles"? And he answered: "I understood at that time I couldn't get them". And the next question: "In 1947"? And his answer: "That's right. But as soon as they were available, I was going to have them". And the next question: "As far as you know, they were first available to you in January of 1948"? And he answered that: "That's right, sir".

Do you disagree with the correctness of that witness' statement?

Mr. Mellin: Well, if your Honor please——

A. I don't know anything about that wholesale business.

Mr. Mellin: If your Honor please, he is talking wholesale. The witness says he knows nothing about

(Testimony of Joseph Granat.)

it except as to the retail, and then counsel continues to argue it, and he doesn't even know the witness.

The Witness: I don't know the witness. [48]

Q. (By Mr. Groner): Now just to clear away the difficulty possibly occasioned by your statement that you had nothing to do with it——

A. Well, I mean it is not my responsibility. I am interested, but it isn't my responsibility.

Q. Well, that is a little modification of what you said earlier isn't it, Mr. Granat?

A. I don't know whether it is or not.

Q. Now look, I am not talking to you about how you and the family——

A. You are talking to me about the same person I don't know anything about, Mr. Jackson or whoever he is.

Q. Now, wait a moment. I am not concerned with how you and the other members of your various friends divide up the business. I am asking you simply and solely the question, if you were not either an officer, if the unit was a corporation, or a partner if it was a partnership, of Granat Manufacturing Co. or of Giaccobi, since before 1940 up to the spring of 1947.

A. I have been, but not since 1940.

Q. What do you mean?

A. I wasn't an officer then.

Q. You were a partner, if you weren't an officer, weren't you? A. No.

Q. You were just a silent partner?

(Testimony of Joseph Granat.)

A. In 1940? [49]

Q. Yes. A. 1940—no, I wasn't.

Q. Would you furnish us after the lunch recess with an exact tabulation of your relationships to the plaintiff, to Granat Manufacturing Co., and to Giaccobi? A. I would be glad to.

Q. From before 1940 up to date?

A. Yes, sir, I would be glad to.

Mr. Groner: Now the question that I am going to ask, may it please your Honor, are all predicated on the showing that this witness was either a partner or an officer during this period.

The Witness: I wasn't, all during that period. I can tell you that.

Mr. Groner: Do you know Leonard B. Goldblatt, who testified on behalf of the plaintiff in this matter and who is a resident of Salem, Oregon?

A. I do not know the gentleman, no, sir.

Q. Well, now, I direct you to page 26 and 27 of Mr. Goldblatt's testimony. He was asked: "Did you have any knowledge of it—" —Wed Lok—" — during the war years"? His answer was, "No, sir". The next question: "Was it available to you during the war years"? A. "No, sir".

Is that incorrect?

A. I don't know whether it is correct or not. I don't know Mr. [50] Goldblatt or whatever his name is. I don't know anything about it.

(Testimony of Joseph Granat.)

Q. You do know Mr. Giaccobi, don't you, of Portland? A. I know Giaccobi, yes.

Q. And you know that he has testified on behalf of the plaintiff in this matter? A. He has.

Q. Now Mr. Giaccobi testified, at page 30: "Well, during the war they—" —Granat—" — were not making all those styles. They were just making a few, a certain few rings. They eliminated making a lot of them." Is he incorrect in that?

A. Well, I don't know. When he says "a lot" of them, I don't know. We eliminated some, but I don't what Giacobbi means, "a lot of rings".

Q. Among those they eliminated was Wed Lok, wasn't it, Mr. Granat? A. Did he say so?

Q. He said he couldn't get them.

A. He couldn't get them—there was a lot of other things you couldn't get during the war.

Q. No, I should perhaps read you further from Mr. Giaccobi's testimony. On page 43, Mr. Granat, there appears this question: "Now I think you mentioned that during the war years Granat Bros. were not making Wed Loks. Is that your testimony"? And the answer: "Yes. Pardon me. As far as I know; at least they [51] might have been making them, but we were unable to purchase any from them. At least I was not able to purchase any from them. Whether they were making them or not I can't tell." And then the next question: "Did you send any orders in?" The answer: "There was no orders. I used to go down and buy what I could.

(Testimony of Joseph Granat.)

They were not accepting orders". And then the question: "In any event, you were not able to place an order and receive the goods?" And the answer: "I wasn't able to order anything from them. I used to go down and get what I could from them, or they sent me whatever they had, whether I had ordered it or not".

Do you think he was inaccurate in his statement there?

A. Well, I didn't do it—I couldn't tell you. Mr. Wineroth could tell you more about that. I couldn't tell you. Yes, I don't think he could get what he wanted; some of his statements are correct. Others are not. I don't know.

Q. And he couldn't get Wed Loks, could he?

A. I don't think he could get much of anything.

Q. Just restrict your answer to my question, will you please?

A. I don't know whether he could or whether he couldn't. All I could tell you is, we were making them right along. I am interested mainly in the manufacturing end of the business, and the retailing.

Q. Now you know, Mr. Granat, Mr. Philip Klieger, who has appeared as a witness for Granat in this case? You know him, don't you? [52]

A. I don't know.

Q. You don't know? A. No, sir.

Q. You don't know him?

A. I don't know him.

(Testimony of Joseph Granat.)

Q. And you don't know that he is a customer of Granat?

A. I don't know he is a customer of Granat.

Q. Well, now I will read from his testimony and see if it isn't correct. This is on page 32: "Now you mention that there was no purchases in the war time." And the answer: "No, there were purchases in the war time but I don't know of any Wed Loks."

Is that inaccurate, Mr. Granat?

Mr. Mellin: Your Honor, how can this witness tell what this other witness could remember? It is ridiculous.

The Witness: Jesus, I don't know.

The Court: Yes. Sustained.

Mr. Groner: May I call your Honor's attention, or the attention of this record, to the various other witnesses produced by this plaintiff who testified time after time that they couldn't get Wed Lok——

The Court: How could this man tell that somebody else's memory didn't call to his mind that these rings were sold or were able to be had?

Mr. Groner: May it please your Honor, I am not asking that.

The Court: That was what your question was.

Mr. Groner: I am only asking if he thinks the witness was incorrect.

Mr. Mellin: And saying that he couldn't remember.

The Court: His memory was faulty? Sustained.

Q. (By Mr. Groner): You testified earlier,

(Testimony of Joseph Granat.)

didn't you, Mr. Granat, that you were in charge of plaintiff company and that you had charge of litigation instituted by or participated in by that company, isn't that the fact?

A. I don't know what you are asking me about; would you make that plainer so I can understand what you are talking about?

Q. In your earlier testimony, and I refer to page 55 of the San Francisco depositions, you were asked: "You personally instructed counsel what to do or what you wanted done, is that correct"? And you answered, "Yes."

A. I instructed the counsel?

Q. Yes.

A. What do you mean by that?

Q. With respect to "participating in Granat Bros.' policy with respect to actions or lawsuits," like the instant one. Is that your earlier statement? A. Well——

Q. Is that accurate?

A. I still don't know what you mean. You mean that I told them to bring suit? Is that what you mean?

Q. Well, that is what it boils down to; and take the various [54] preliminary steps to bringing suit.

A. Well, I don't know much about the preliminaries. I told my attorney to bring suit, yes.

Q. And then the next question at that time: "Has that been your practice at some time?" Answer: "Practice of what?"

(Testimony of Joseph Granat.)

Q. And you answered: "Your practice with respect to instructing counsel and directing legal policy." And you answered, "I confer with some of my associates, but I am the deciding factor."

That is the fact, is it not?

A. Well, yes, I could say——

Q. When did you first notice the use of the mark "Feature Lock"?

A. In 1948, I believe.

Q. Can you place a date?

A. Not exactly, not an exact date. I believe it was in the month of May, something like that.

Q. After you noticed this first use, you caused certain notes to be sent to users of this mark, did you not? A. Yes.

Mr. Groner: May it please your Honor, I should like to introduce at this time, as a matter of convenience, a copy of Defendant's registration mark, No. 506514, which has only been issued in the last month, but which was applied for some time earlier. And I should like particularly to call your Honor's attention to the fact that the application, or the registration, states, "The word 'lock' is disclaimed apart from the mark as shown on the drawing." Simply indicative of the fact that we use the word "lock" only as "lock" would normally be used in its descriptive sense. This, I believe, is Defendant's Exhibit——

* * *

The Clerk: No. 6.

(Testimony of Joseph Granat.)

(Registration No. 506514, referred to above, was thereupon received in evidence and marked Defendant's Exhibit No. 6.)

Q. (By Mr. Groner): You did testify before I interrupted you that you had authorized the sending of notices?

A. Yes, I get advice from my counsel, and we decide to go in and do these things. But I mean, you can say that I am the deciding factor.

Q. You sent almost simultaneously, or caused your counsel to send, a considerable number of other notices of asserted infringement and asserted unfair competition because of others' use of the word "lock," isn't that correct?

A. That is so. I don't know the number, yes.

Q. Now you testified earlier, as I recall, that there were about 24 different notices which had gone to different users of the word "lock," isn't that correct? A. I don't know the number.

* * *

Mr. Groner: Now may I parenthetically remark to your Honor at this time that we have heretofore gathered eight different examples of these notifications or notices of plaintiff or plaintiff's counsel to descriptive users of the word "lock." There are a considerable additional number. I believe there are about sixteen, according to the testimony of Mr. Granat earlier [57]

The Witness: Did I say that number?

Q. (By Mr. Groner): You said about 24?

(Testimony of Joseph Granat.)

A. That was using the name. But not that we sent letters out to or anything.

Q. I think you said you sent them to about 24.

A. Sent letters?

Mr. Groner: If you will wait just a moment, I will find your reference. Excuse me, please.

Q. Refer now to page 71 of your earlier evidence, Mr. Granat. You were asked on page 70—I have to go back to make it understandable: "Well, are we to understand from what you say, Mr. Granat, that you simply issued blanket instructions —that is, instructions to your counsel?" The answer is: "I don't—we started out and we sent a couple of these, a few of these letters which you have there." The question: "You are indicating Defendant's Exhibit 13A, 12——" And you interrupted and said, "Yes." And then the question continues: "——11, 10—" —referring to exhibit numbers, if it please your Honor— "—those are the ones you are pointing to?" And the answer, Mr. Granat, which you gave: "Yes, and sometimes a new infringement, a name will come along. I might call his—" —counsel's— "—attention to it. He has about 24, maybe more than that, names of locks." The question: "Well, have notices of infringement been sent to all of them?" And the answer: "I don't know." And then you continue.

A. That's right, I didn't know; I don't know how many letters were in them.

* * *

(Testimony of Joseph Granat.)

Mr. Mellin: We did notify, for the record, your Honor—may I have those? (Documents produced.)

Mr. Mellin: Now, as I say, as our case shows, this defendant commenced using Feature-Lok in May. They were sued in August. In between that time I have in front of me the Corpus Christi Caller of Thursday, July 15, 1948 advertising wedding ring ensembles under the name Feature-Lok, "L-o-k," not "L-o-c-k." They were notified.

I have also before me a tear sheet of the California North Hollywood San Fernando Valley Times dated—I don't remember the date of the paper—September 2, 1948, Cupid Lock, in script—and by the way, these are all in script like Wed Lok has always been used, your Honor, and I have before me page 14 of the Independent of Long Beach, Dovetail Lock also in script. They were notified.

Mr. Naylor: What is the date of that?

Mr. Mellin: Saturday, August 6, 1948. I have before me the Salisbury Times of Salisbury, Maryland, July 29, 1948, in script, "Rhapsody Lock." They were notified.

I have before me, and I don't have the date—it is an Albuquerque, New Mexico paper in which is advertised Love-Lock, not in script, but in which they even copy the art work of the Granat ads. They were notified.

I have in front of me the Detroit News of July 9, 1948, the word "Treasure-Lok," for diamond ring ensembles. They were notified.

(Testimony of Joseph Granat.)

I have before me Life Lok in script, Manne & Sons in New [61] York. They were notified.

Mr. Naylor: May I have a date on that?

Mr. Mellin: I beg your pardon. That is the News Magazine of the jewelry industry, and I have a date on here somewhere—July 1, 1948. I beg your pardon.

I have in front of me also the Daily News—I don't see the town—Stamford, Connecticut, September 17, 1948, Duo-Lock—D-u-o Lock in script.

I have in front of me the Portland, Oregon Journal for Wednesday, September 15, 1948, Lucky-Lock in script for wedding ring ensembles.

I have before me the Adrian Daily Telegram of Michigan, August 28, 1948, Eterna Lock in script for wedding ring ensembles.

And I have before me the Beaver Valley Times of Beaver and Rochester, Pennsylvania, Bridalok, l-o-k, in script, for the same thing.

I have before me in script on the Los Angeles Daily News of Wednesday, July 1, 1948 Heart Lock in script for wedding ring ensembles.

And I have before me the Elko Daily Free Press, the word "Wed Lok," L-o-k, in two words, and underneath it says, "Diamond rings with the exclusive feature-lock in script, using this defendant's trade-mark and undoubtedly this defendant's lock.

I have another, the Humboldt Standard, Monday, July 12, 1948, Wed Lok, L-o-k. [62]

And I would like to offer that group of papers

(Testimony of Joseph Granat.)

in evidence, your Honor, and I believe that those were notified of infringement of the trade-mark, and we will show as we proceed that most of these are users of this ring setting in which they set their own diamonds, and that it was the lock, which is trading on our reputation.

Mr. Groner: Do I understand notices did go to all those?

Mr. Mellin: I am certain—I will admit they all went to them—I am almost certain they all went to each one. That is how I made the collection.

* * *

Q. (By Mr. Groner): Referring, Mr. Granat, to the Jewelry Circular Keystone for May 1948, page 69, which is Plaintiff's Exhibit I, did you observe that advertisement?

A. I observed it.

Q. Did you observe the prominent name, which you see, of the product there referred to?

A. The name "Feature-Lok"?

Q. No, the name of the person or firm who issued it. A. The address is there, yes.

Q. And that advertisement does show in large letters the name "Feature Ring Co., Inc., 128 West 46th Street, New York 19, New York," does it not? A. Yes.

Q. And you also caused to be sent a circular letter addressed to "our customers," did you not?

A. To whose customers?

(Testimony of Joseph Granat.)

Q. Well, assumedly Granat Manufacturing Company customers. A. That is right. [65]

Q. I refer you to Defendants' Exhibit 15.

A. Yes. What about it? What is your question?

Mr. Groner: Will you read the question.

(Question read.)

Mr. Mellin: Let the record show "our" meant Granat Bros.

The Court: With that explanation you may answer it.

A. Yes, sir.

Q. (By Mr. Groner): And that went to about a thousand? A. I don't know the number.

Q. Do you know whether they were active customers of Granat Bros. or Granat Manufacturing Company? A. To the active customers.

Q. Only to the active customers?

A. Supposed to have been only to the active customers.

Q. Were they exclusive customers of Granat?

A. I don't know whether they were exclusive. They were our customers.

Q. Do you have a list of a thousand customers, Mr. Granat? A. I don't know.

Mr. Groner: That is all, your Honor.

Redirect Examination

By Mr. Mellin:

Q. Mr. Granat, just one or two questions. With reference to rings in general, leaving out Wed Lok,

(Testimony of Joseph Granat.)

you have a number of other trade-marks, do you, that designate [66] engagement rings, wedding rings? A. We have others, yes.

Q. Other than Wed Lok? A. Yes.

Q. You have quite a few?

A. We have several of them.

Q. Is there any value to Granat Bros., as far as you understand, of advertising your trade-mark in the book he showed you?

A. Oh, that thing—we get sort of—we get a form letter that doesn't mean a thing to me. That book has no value to me.

Q. And what does the word—Mr. Groner was asking you about whether the trade-mark "Wed Lok" was used in a descriptive sense—what does the word "Wed Lok" actually—what was it intended to convey?

A. Well, in our own business we would say—you have the Orange Blossom rings, which meant the Trout Manufacturing Company, or you have Art Carve, which means J. R. Woods. When it is Granat it is the same principle, that identifies us; when they say "Wed Lok" it means Granat.

(Thereupon a recess was taken until 2:00 p.m. this date.)

Afternoon Session—2:00 p.m.

The Court: Is there any further examination of this witness?

(Testimony of Joseph Granat.)

Mr. Mellin: Just to clear up the matters counsel requested, your Honor.

May the record show, your Honor, that during the noon hour we determined that the L. A. Giaccobi Company was a partnership consisting of two Giaccobis and Joseph Wineroth, from prior to 1934 to December 1941, or rather, up until 1944. And at that time the partnership was succeeded by a second partnership of Mr. Leo Granat, Mr. Joseph Granat, and Mr. Joseph Wineroth, and Mr. L. A. Giaccobi; that in June of 1946 a corporation, the L. A. Giaccobi Company, operating under the fictitious name of Granat Manufacturing, succeeded to the rights of the three, the two Granats and Mr. Joseph Wineroth; that they are equal owners of the stock in that company and that the Granat Bros., the corporation, the stock is owned equally by Joseph Granat and Leo Granat.

Is that satisfactory, counsel?

Mr. Groner: Entirely.

Mr. Mellin: Now, the witness was asked during the lunch hour to produce any other ads that used "Wed Lok," retail ads; and I confined it to retail ads because, I may state for the record that Mr. Joseph Granat doesn't have anything [68] to do with the running of the business of the wholesale end. And these ads were located by their advertising department. (Handing to Mr. Groner.)

This covers the years '41, '42 and '43.

I produce an ad, "Wed Lok," which appeared in

(Testimony of Joseph Granat.)

the San Francisco Examiner of June 1, 1941, and I offer that in evidence as plaintiff's next in order.

Mr. Naylor: May we reserve the right to inspect? Because these were not produced on the depositions, and we have not seen them before.

Mr. Mellin: No objection.

The Court: Certainly, you have the right to inspect them before they are offered.

Mr. Naylor: I thought it might save time if we did it during one of the recesses, your Honor.

The Clerk: Plaintiff's Q.

(Ad appearing in Examiner June 1, 1941 was received in evidence and marked Plaintiff's Exhibit Q.)

Mr. Mellin: And a second one, an ad in the San Francisco Examiner for Sunday, November 23, 1941, Wed Lok.

The Clerk: R.

(Ad appearing in Examiner November 23, 1941, was received in evidence and marked Plaintiff's Exhibit R.)

Mr. Mellin: And a third one. And may I ask the clerk to nail this together in some [69] fashion?

The Clerk: Certainly.

M. Mellin: A third one is the San Francisco Examiner ad for Sunday, September 28, 1941, showing Wed Lok in the lower left-hand corner.

The Clerk: S.

(Testimony of Joseph Granat.)

(The ad referred to was received in evidence and marked Plaintiff's Exhibit S.)

Mr. Mellin: And in the Sunday Examiner of April 19, 1942, a Wed Lok ad; I offer that as next in order.

The Clerk: T.

(The ad referred to was received in evidence and marked Plaintiff's Exhibit T.)

Mr. Mellin: And a Wed Lok ad by Granat in the San Francisco Call Bulletin, May 11, 1942, Plaintiff's next in order.

The Clerk: U.

(The ad referred to was received in evidence and marked Plaintiff's Exhibit U.)

Mr. Mellin: And San Francisco Examiner, Sunday, April 25, 1943, Wed Lok.

The Clerk: V.

(The ad referred to was received in evidence and marked Plaintiff's Exhibit V.)

Mr. Mellin: And a Wed Lok ad that appeared in the Oakland Tribune for Sunday, May 9, 1942.

The Clerk: W. [70]

(The ad referred to was received in evidence and marked Plaintiff's Exhibit W.)

Mr Mellin: And a part of a tear sheet that appeared in the Oakland Tribune, October 10, 1943, Wed Lok.

(Testimony of Joseph Granat.)

The Clerk: X.

(The tear sheet referred to was received in evidence and marked Plaintiff's Exhibit X.

Recross-Examination

By Mr. Groner:

Q. Just one question, Mr. Granat. During the period prior to 1944, when you became a partner in the Giaccobi Company, did you allow that company, or as it was sometimes known, the Granat Manufacturing Company, to use your trade-mark as they wanted to?

A. Yes, they used it as they wanted to.

Q. There was no veto power exercised or no control? A. No.

Mr. Groner: That is all.

Further Redirect Examination

By Mr. Mellin:

Q. But did you allow them to use them on any goods except Granat wedding ring ensembles?

A. No; they were our sole distributors; it was all Granat merchandise.

Mr. Mellin: That is all.

May I at this time ask that we—we have just received a deposition taken in Los Angeles, your Honor, of Benjamin B. [71] Shapiro, and I would like to have it filed at this time, if that is agreeable with counsel.

Mr. Groner: That is agreeable.

Mr. Mellin: Mr. Leo Granat.

LEO GRANAT

called on behalf of the plaintiff; sworn.

* * *

Direct Examination

By Mr. Mellin:

Q. Your name, age, and residence, Mr. Granat?

A. Leo Granat; I am 61; 2447 Cabrillo Street.

Q. And you are an owner of half of the stock of the Granat Bros., the plaintiff here?

A. That is correct.

Q. And you are a third partner in the Giaccobi Company, known as the Granat Manufacturing Company? A. Correct.

Q. And you are the Leo Granat who is the partner of Joseph Granat in manufacturing jewelry in San Francisco since 1906? A. Yes, sir. [72]

Q. What have been your duties in connection with Granat Bros. from 1934 to date, Mr. Granat?

A. In the manufacture and the construction of any jewelry that is manufactured by us.

Q. Are you in charge of the factory?

A. That is right.

Q. How many jewelers do you have employed now?

A. Around about 100 to 145, something like that.

Q. How many jewelers did you have employed prior to, say, January of 1942, prior to the war?

A. It would run around 160.

(Testimony of Leo Granat.)

Q. And how many jewelers did you have during the late war employed?

A. Oh, very few. I would judge probably around 25 or 30.

Q. Now, I hand you exhibit Plaintiff's A and ask you if you can tell us, please, when those rings were—or this ring was manufactured, or commenced to be manufactured—not the identical set, but that type (handing to witness).

A. Oh, this type and style of ring is one of the first ones.

Q. And when was that, please?

A. In the neighborhood of '33, '34, something like that.

Q. And would you know whether or not such sets were identified in any way as "Wed Lok" by marking in any fashion?

A. Yes, sir, they were stamped inside.

Q. That ring is so stamped that you have in your hand? [73] A. Yes, sir.

Q. And do you still manufacture those rings today? A. Yes.

Q. And I hand you Plaintiff's Exhibit B and ask you when, if those rings—or rather, if those rings are manufactured by Granat.

A. Yes, sir.

Q. You have manufactured that type?

A. I did; we did manufacture them.

Q. And when, please?

(Testimony of Leo Granat.)

A. This later, fairly late.

Mr. Groner: What, Mr. Granat?

The Witness: What year?

Mr. Groner: No, I couldn't hear what you said.

The Witness: Oh, not in 1933 or '34—not this one.

Q. (By Mr. Mellin): Not this one?

A. Not this particular ring.

Q. When was that design manufactured?

A. Around 1940, something like that.

Q. And I hand you Plaintiff's Exhibit C (handing to witness), and I ask you if—by the way, with reference to Exhibit B, do you still manufacture that type of ring? A. This one, yes, sir.

Q. And would you examine Plaintiff's Exhibit C, please, and tell us if rings of that type are manufactured by Granat? [74] A. Yes, sir.

Q. And during what period, please?

A. I should judge this was made maybe around '40 or something.

Q. Now, of the two rings, Exhibits B and C, were those rings identified in any fashion by marking them with a trade-mark? A. Yes.

Q. Stamped?

A. And a patent stamp in the ring.

Q. I hand you Plaintiff's Exhibit D, and I ask you about that ring, when you commenced manu-

(Testimony of Leo Granat.)

facturing rings of that type, and were they marked with "Wed Lok" or not (handing to witness)?

A. Yes. These are made around '42, '43.

Q. Is that known as the "Nanette" series?

A. Yes, sir.

Q. And during what period did you manufacture that, say, subsequent to '41? A. Before '41?

Q. Subsequent—after '41. A. After '41?

Q. Yes. A. After '41—yes, regularly.

Q. Were those made all during the war or not?

A. Yes, sir.

Q. And were they marked "Wed Lok" or not?

A. Yes, sir. [75]

Q. Stamped inside of them? A. Yes, sir.

Q. And I hand you Plaintiff's Exhibit E and ask you if that is a type of ring manufactured by Granat Bros. A. Yes, sir.

Q. And when did the manufacture of that type commence?

A. This here was introduced right after, around the war, after; but we began working on this before the war.

Q. And that came out commercially right after the war? A. Yes, as soon as possible.

Q. Is that what you call the "snap-on" type?

A. That is correct.

Q. That has a mechanical lock or latch?

A. That is correct.

The Court: You say right after the war; you mean after it started, or after the finish of the war?

(Testimony of Leo Granat.)

The Witness: After it finished.

Q. (By Mr. Mellin): Now, do all of the others have a mechanical lock or latch of some type?

A. One of them has.

Q. Which one is that? Would you identify it for me, please? A. Here it is right here.

Q. And will you put it back and give me the exhibit number? A. C.

Q. Exhibit C. Thank you, Mr. Granat. [76]

Now, if you know, do you know what production of Wed Lok rings was prior to December of 1941 per day, approximately?

A. Well, I can't exactly tell you, but our production was around 175, 200 rings a day.

Q. And after the war was over, say, in 1947, what was the production——

A. These—not so much, but we did quite a lot of Wed Loks. About 50 per cent, I should judge; something like that amount.

Q. After the war was over? A. Yes, sir.

Q. And would you say whether, at any time, the Granat Bros. Manufacturing, between 1934 and to the present time, has ceased to manufacture the rings marked "Wed Lok"? A. No, sir.

Q. They were manufactured all during the war?

A. Yes, sir.

Q. Now, would you tell us, please, and make it as precise as you can, when the production of Granat merchandise, including Wed Loks, was cur-

(Testimony of Leo Granat.)

tailed because of the war? Can you give us that date?

A. I could not; but there was restrictions on metals and everything else, and part of our men, they went off and they went to war work, and everything else like that. I really can't tell you. But when the restrictions came on, we were hit pretty hard. [77]

Q. Can you tell us when that was with reference to the declaration of war on December 8, 1941?

A. It must have been about six or eight months.

Q. Afterwards or before? A. Yes.

Q. Afterwards? A. Afterwards.

Mr. Mellin: That is all. Oh, one more question, if I may.

Q. What was the reason that there was only 25 jewelers in the Granat Manufacturing Company during the war?

A. Well, a lot of them went into war work, and we found out about certain propositions that the Government had, and a lot of them went to war work, where they were really necessary, and others went to war, and most of our help were in that age category, and we lost quite a bit.

Q. And they were all skilled jewelers, were they not? A. Oh, yes.

Q. Could you replace them? A. No.

(Testimony of Leo Granat.)

Cross-Examination

By Mr. Naylor:

Q. Mr. Granat, will you kindly examine Plaintiff's Exhibits A to E inclusive (handing to witness), taking A first, and state whether or not the rings contained within that set are interlocked in any way? [78]

A. Well, the only thing that they do is, they form kind of a contour that has a shape to it. That is as far as——

Q. Now, that is because of the peculiarity of the shape of the wedding ring, with a matching shape on the engagement ring, isn't it?

A. That is correct.

Q. Will you please examine Plaintiff's Exhibit B and state whether or not there is an interlocking mechanism of any kind (indicating).

A. No, sir, it is the same thing.

Q. Same as A? A. That is correct.

Q. Those are the contoured shapes, aren't they?

A. That is correct.

Q. And they interlock by virtue of the matching shapes? A. They go in——

Q. Just a moment.

A. They can't shift from one side to the other. There is no interlocking on them.

Q. But they are locked against rotation, aren't they?

A. Well, yes, on movement of your finger, why, that is the only thing that can stop it, probably.

(Testimony of Leo Granat.)

Q. They are locked against a rotating shift, aren't they?

A. That's right. They are not locked; they are just interwoven, or whatever you might call it. [79]

Q. Now will you please examine Plaintiff's C and state whether or not that contains any sort of a locking mechanism (handing to witness).

A. Yes, sir.

Q. What is the nature of the lock there?

A. Well, that goes up and down (indicating).

Q. Will you describe it to the Court?

A. Sure. There is a core in this, and a peg on this, and it just slides up and like this (indicating). It takes the place.

The Court: Would you repeat your answer for the reporter, please?

The Witness: If you wish, I will put it together.

The Court: Please do. Go right through the same operation.

Q. (By Mr. Naylor): And describe it. Then the reporter will get it.

A. Well, in the movement, there is a peg and a hole, and the peg fits, the movement up and down, see, the movement up (indicating), and then it looses, and then you pull it down and it tightens itself (indicating). [80]

Q. As in the case of a dovetail joint?

A. On the same principle; it doesn't dovetail, it goes straight up and down. There is no dovetail of this at all.

(Testimony of Leo Granat.)

Q. And that was the locking mechanism that prevented rotative shift, as between the wedding and engagement rings in that particular set, is that correct? A. That is right, yes.

Q. Now will you please examine Plaintiff's D and state whether or not you find a locking mechanism within that ensemble? A. No.

Q. What is the nature of the set?

A. This is the same as the others.

Q. The same as A and B?

A. That is correct.

Q. And there again, the means employed to prevent rotative shift as between the engagement ring and the wedding ring is a peculiarity of the matching shapes, is that correct?

A. That is correct. This ring here, so they won't —(indicating).

Q. They won't turn in relation to each other?

A. There is no mechanical device to it.

Q. But they do interlock?

A. Yes, in a sense.

Q. Now, will you examine Plaintiff's E and state whether that ensemble contains a locking mechanism? [81] A. Yes, sir.

Q. What is the nature of that locked mechanism?

A. It is—there is a snap on either side of the rings, and one of them fits into the other one with a snap motion or movement, or whatever you might call it (indicating).

(Testimony of Leo Granat.)

Q. It is a miniature of the Carr fastener, isn't it?

A. I don't know. It is similar as a glove, a snap.

Q. It is like the fastener on this key container, isn't it? A. That is correct.

Q. In other words—— A. Yes, sir.

Q. In other words, there is a pin that enters a spring clasp, isn't that it?

A. Yes, it is just like this (indicating).

Q. And so the fastener on E is a miniature snap, a miniature of that?

A. E? Which one is that?

Q. The one you just looked at. A. No, sir.

Q. Have you got the ring?

A. I have it here.

Q. That is a miniature snap fastener, isn't it?

A. Yes, sir.

Q. Is that right?

A. Well, I don't know what you would call it, but they fasten. [82]

Q. And there is a spring snap to it?

A. Yes, sir (indicating). You hear that?

Q. Now they are locked together?

A. That is correct.

Q. And you are speaking now of Plaintiff's G?

A. That's right.

Q. Now will you state whether or not it was practical in the production end of Granat Bros. for you to stamp these various rings, A to E, with the trade-mark "Wed Lok"?

(Testimony of Leo Granat.)

A. That is correct.

Q. How was that done? A. By machine.

Q. Did you have a die for it?

A. Yes, that is right.

Q. Now was it your practice to also stamp patent numbers within the rings? A. Yes, sir.

Q. Will you please examine Plaintiff's E and state whether or not that particular setting contains a patent number and if it does, will you please read it into the record?

A. I can't; I would have to have a loupe.

Q. You don't have a glass? A. No, sir.

Mr. Naylor: May we interrupt just a moment, your Honor? I think we can get a glass. [83]

(Mr. Naylor handed a magnifying glass to the witness.)

A. (Continuing) That is 1-9—I don't know—2-8-6-4. There is one number that is pretty—I guess I could guess at it, but I don't want to guess at it. Can I see that other one a second?

Q. Yes, indeed. (Handing to witness.)

A. Now this one here was "Wed Lok" in there, and it has the patent number in there (indicating).

Q. You are referring to the engagement ring portion of E as having the trade-mark?

A. That is correct.

Q. And the wedding ring portion as having the patent number? A. That is correct.

Mr. Naylor: I think that is all.

* * *

JOSEPH NORMAN WINEROTH

called on behalf of the plaintiff, sworn. [84]

* * *

Direct Examination

By Mr. Mellin:

Q. What is your full name, Mr. Wineroth?

A. Joseph Norman Wineroth.

Q. What is your age and residence?

A. Age 54, residence 2121 Broadway, San Francisco.

Q. What is your occupation?

A. President of the Granat Manufacturing Co.

Q. Is that the L. A. Giaccobi Co. we have been speaking of? A. That is correct, sir.

Q. And how long have you been associated or a partner or an official, or interested in the various partnerships and corporations, the L. A. Giaccobi which is known as Granat Manufacturing?

A. About 1925.

Q. And what was your business before that time?

A. Well, I was employed by the same company.

Q. And what is the respective business of the Granat Manufacturing Co.?

A. Well, they distribute the products of the Granat factory.

Q. And what products are those?

A. Well, the "Wed Lok" ensembles, and other ensembles.

Q. Do you handle goods of others in addition to the Granat Bros.' goods?

(Testimony of Joseph Norman Wineroth.)

A. We handle no other merchandise of any description other than loose diamonds that we import.

Q. As far as manufactured goods are concerned, your business is [85] confined entirely to the sale of diamond, wedding and engagement rings?

A. That is correct, sir.

Q. And for how long has that been so? With that company?

A. We started about 1915 or 1916, selling Granat products.

Q. And have been exclusively representing them since that time?

A. We have been exclusively representing them; but there was a period there when we first started that we carried a few other products. But as we went along, I would say after a period of about five or six years, we discontinued the sale of all other products and concentrated our efforts on Granat Factory's products.

Q. And those were always diamond rings?

A. That is correct, sir.

Q. Now during the period of, from, say, 1934 to date, what has been your responsibilities and duties with that company?

A. Well, I watched the overall picture of our business as president; that is my job.

Q. Do you closely follow the details of sales?

A. I most certainly do.

Q. Advertising? A. I do.

Q. And the merchandise that is sold?

(Testimony of Joseph Norman Wineroth.)

A. I try to cover every phase of our business.

Q. And that is under your very immediate control? [86] A. That's right, sir.

Q. Are you familiar with the sets of rings that we have been discussing here, Plaintiff's exhibits A to E inclusive? A. I am.

Q. And I hand them to you and ask you if you will select the one, if you can, of them which you commenced selling in 1934, and will you pick out the others and tell us when those were sold commercially? (Handing to witness.)

A. This one here is the one we first started.

The Court: Refer to it by the exhibit number.

The Witness: Exhibit A.

Q. That is the first one? A. Yes, sir.

Q. And the next one was which one, please?

Mr. Groner: Be more specific, will you?

Q. (By Mr. Mellin): Exhibit A. And the next ensemble, marked "Wed Lok" was which of them? Did you say the first one? Would you give us the date, please?

A. Yes, sir. The first one was Exhibit A, March 15——

Q. That is the clerk's date. When did you start exhibiting those, of your knowledge?

A. These were started about the latter part of '33 or '34.

Q. I see. And at that time were they marked "Wed Lok"? A. Oh, yes.

Q. All right. Continue, please, and give us the

(Testimony of Joseph Norman Wineroth.)

date when, to [87] your knowledge, you commenced selling them, and give the exhibit numbers.

A. Well, this one here was in '33 or '34.

Q. That is exhibit A? A. That's right.

Q. Will you take the next one?

A. The next one that we brought out was Exhibit D.

Q. And when was that brought out, please?

A. This we brought out in 1940, maybe a little after, '41 or '42, just prior to the war.

Q. (By Mr. Mellin): That is Exhibit what?

A. Exhibit D.

Q. D? A. Yes, sir.

Q. And did they have a series name other than Wed Lok?

A. Yes, this was referred to as the Nanette series.

Q. Will you tell us please what is meant and what you mean by "series"?

A. Well, "series"—take this ring first—the particular motif, a design motif; we may make it with two diamonds on the side, or two diamonds on the side and the center, like the one I am referring to. Then we make them with four or six, and we have a motif on there and we call that—we refer to that as a series; we call it the Wed Lok Nanette series, and then Wed Lok A and B series, and this particular one is the Wed Lok Nanette [88] series.

Q. Did you ever at any time discontinue the sale of that ring? A. Never did.

(Testimony of Joseph Norman Wineroth.)

Q. What about during the war period?

A. We didn't discontinue the sale of it. We didn't sell it in quantities, but we sold it. I have orders for them. It was sold.

Q. Will you take the next one and tell us about it, please? By the way, are they still selling the Wed Lok Nanette series today? A. Yes, sir.

Q. And were those rings marked "Wed Lok" during the war?

A. Yes, sir. The next one is Exhibit E.

Q. When did you commence selling it?

A. We commenced selling this soon after the war—I think it was June of 1947, or whenever we got back into production—I imagine it was 1947, June or May of 1947, or 1946. I can't reconcile the date.

Q. Is that ring known by a particular trademark?

A. Well, it is a Wed Lok. I think we gave it a number of G—once we made this in several ornaments, we called it G-4, 5, and 6. Now G-3, that meant there was three stones in the Wed Lok; G-4 meant there was four stones in the Wed Lok; G-5 meant there was five stones in the Wed Lok. That was a means of identifying them. However, it was called a Wed Lok and still is a Wed Lok. [89] That is the way we identified them, in our ads.

Q. All right. Will you take the next one?

A. Now this is Exhibit C. Now this particular style, we made this years ago——

(Testimony of Joseph Norman Wineroth.)

Q. What do you mean by "years ago"? Will you be more specific?

A. Oh, we made this ring, this particular type of ring—it is difficult for me to answer the question, but I will say—oh, it could be 1926 or 1927, this particular locking feature on the ring.

Q. 1926?

A. Yes, this particular one. But that was an entirely different—I am speaking of principle now —but this particular design ring I am holding in my hand we just produced in 1948.

Q. In 1948? A. This was produced in 1948.

Q. All right. Will you take the next one, please? What is the exhibit number, Mr.——

A. This is Exhibit B. This is the Wed Lok. We call this a wedded series.

Q. Were those sold by you commencing when, Mr.——?

A. Well, we have been selling this for some time —I mean three or four years ago we started manufacturing this type of ring.

Q. Now at any time from the period 1934 to the present have you discontinued selling rings marked and known as Wed Lok?

A. At no time to my knowledge did we ever. [90]

Q. And you are familiar with the advertising of Granat Manufacturing Co. to the distributors?

A. I am, sir.

Q. Will you tell us, please, so we will have it

(Testimony of Joseph Norman Wineroth.)

clear, the division between the retail and what has been termed the wholesale, here, so we will have a clear picture? As I understand, the retail store is that the Granat Bros. retail stores sell Wed Loks only—I mean in addition to other things—they sell in San Francisco and Oakland, and that everything outside of those two towns is wholesale?

A. That is correct.

Q. And those sales outside of San Francisco and Oakland would be handled by your firm under your direction? A. That is correct.

Q. Now during the period of 1936—by the way, there was some question this morning whether Wed Loks were being manufactured and sold during the years 1940 and 1941. What do you have to say to that? A. Between the years 1940 and 1941?

Q. Yes. A. Being manufactured and sold?

Q. Yes. Wed Loks.

A. Well, now, in the wholesale department we never did stop—that is, never did stop selling them; we sold them every year I know of since 1934. [91]

Q. And when was the curtailment, before the start of the war, or after the start of the war? That is, the production?

A. The curtailment was right after the start of the war.

Q. So that Wed Loks were sold—what would be the comparison between the sale of the Wed Loks in the years 1940 and 1941 as compared with the years 1938 and 1939?

(Testimony of Joseph Norman Wineroth.)

A. Would you repeat that question, please?

* * *

Q. (By Mr. Mellin): I mean, were there less sales in 1940 and 1941 than in 1938 and 1939, or more?

A. I would say that the average was about the same.

Q. During those years? A. Yes.

Q. And the curtailment happened then in 1942, 1943, 1944 and 1945?

A. Because of our limited productions.

Q. During those war years you testified you sold Wed Lok rings? A. We did.

Q. Continuously, is that correct?

A. That is correct.

Q. Now what was the method of distribution? I mean, how did you sell Wed Loks? By the way, what territory did you sell [92] Wed Loks in during the years 1936 to 1941 inclusive?

A. We sold Wed Loks in every state in the union, throughout the United States.

Q. During those years? A. That is right.

Q. What was your method of selling, that is, handling sales? Would you explain that to us, please?

A. We have three men out of our own office, and our plan was—we called on the principal or the key cities of the United States and then we appointed a distributor in different sections of the United

(Testimony of Joseph Norman Wineroth.)

States. As an example, in the State of Washington, in Seattle we had Mayer Bros.; in Kansas City we had the C. A. Keiger Co., and in Pittsburgh we had the Hall Bros. Co., and in Atlanta, Georgia, we had the Ewing Bros.

Q. Just a moment. To speed this up, you handed me a list yesterday entitled "Granat Manufacturing Distributors and territory covered by them from 1936 to 1941, inclusive, also towns covered by Granat salesmen during the same period." Will you tell the court if that is a correct list, and then I could maybe carry through one special transaction.

A. That is a correct list.

Q. What territories were covered by those various distributors that you speak of?

A. Well, the United States was covered by them.

Q. I mean, what did Mayer Bros. cover—— [93]

A. Mayer Bros. covered Washington, Oregon, Idaho, Montana, Utah, and Wyoming.

Q. Except certain cities you specify?

A. We catch the key cities I mentioned; in this particular territory we keep out the city of Seattle, Spokane and Portland, and they themselves work all the other towns.

Q. And your salesmen work those particular towns you mentioned? A. That is right.

Q. Now how many salesmen, if you know, did the Mayer Bros. have?

A. They had four salesmen covering the various states I mentioned.

(Testimony of Joseph Norman Wineroth.)

Q. Did they cover all the towns in that area that had a jewelry store?

A. I imagine they covered them pretty well. I wouldn't say, I don't know, but that was their business, to get all the business they could, and I presume they would cover every town they could.

Q. What was the next one?

A. The next one was A. Keiger; they have the middle west. Their states were North Dakota, South Dakota, Nebraska, Oklahoma, Texas, Minnesota, Iowa, Missouri, Wisconsin, Illinois and Indiana.

Now with these exceptions: Omaha, Kansas City and Topeka, Memphis, Dallas, El Paso, Houston, Fort Worth, San Antonio, Duluth, Minneapolis, St. Paul, Cedar Rapids, Davenport, Des [94] Moines, Iowa City, Mason City, Sioux City, Waterloo, St. Jo, St. Louis, Madison, LaCrosse, Milwaukee, Waukesha, Chicago, Duluth, Moline, Peoria, Rockford, Evansville, Fort Wayne, Gary, Indianapolis and South Bend——

Q. Who made those towns?

A. The towns, the last group of towns made by our own salesmen.

Q. How often would they make those towns?

A. Well, some of them we would make twice a year.

Mr. Naylor: May we limit this in time?

Mr. Mellin: This is 1934, 1936 to 1941—is that the period?

A. Yes. Some of the towns we made twice a

(Testimony of Joseph Norman Wineroth.)

year, some three or four times a year, depending on the size of the town. Some of the towns we didn't cover as often as some of the larger towns.

Q. How many salesmen did they have, this C. A. Keiger Co.? A. They had seven salesmen.

Q. Would they, like in the other instances, make the towns? A. I suppose so.

Q. Go to the next one.

A. The next one was Hall Bros., and they covered the states of Ohio, Pennsylvania, West Virginia, Virginia, Maryland, and Michigan with the exception of the following cities: Dayton, Cincinnati, Cleveland, Toledo, Youngstown and Columbus, Philadelphia, Pittsburgh, Scranton, Wilkes-Barre, Norfolk, Richmond, Baltimore, and Ann Harbor, Bay City and Detroit, Flint, Kalamazoo, Grand Rapids, Lansing, Muskegon, Port Huron, and Saginaw. [95]

Q. How many salesmen, if you know, do the distributors have there?

A. Hall Bros. have four.

Q. And they were supposed to make the remaining towns in that area like the others?

A. That is right.

Q. Now with the other two dealers, a like situation—What was the next one?

A. We had Ewing Bros. here. They made the southern states, consisting of Tennessee, Mississippi, Louisiana, Georgia, North Carolina, South Carolina, Florida and Alabama with the excep-

(Testimony of Joseph Norman Wineroth.)

tion of Memphis, New Orleans, Atlanta, Savannah, Birmingham and Montgomery.

Q. And the next one?

A. That is all, sir.

Q. That is all.

Mr. Mellin: May I offer this in evidence as a compilation of the witness' testimony?

(Document referred to was thereupon received in evidence and marked Plaintiff's Exhibit Y.)

Q. (By Mr. Mellin): Now you handed me yesterday a list of what is termed, "Wed Lok dealers sold directly by Granat Manufacturing Co. during the period 1934 to 1941, inclusive, but not including amounts sold by distributors, number of towns 212, number of states 37, and Hawaii, and number of dealers 615." By dealers [96] I understand that would be customers?

A. Yes.

Q. And I ask you—may I withdraw that last part. Will you tell us, please, did you get all the distributors, did you get them all at the same time? Do we have an accurate record here?

A. The first one was the C. A. Keiger Co.

Q. When was that?

A. That was in about 1934, and then a couple of years later we added the Hall Bros. account, and I believe the following year we had the Ewing Bros. in Atlanta.

(Testimony of Joseph Norman Wineroth.)

Q. That would be about 1936 or 1937?

A. I think it would be earlier than 1937, about 1936.

Q. And the final one?

A. Then the final one that following year, or maybe that same year, I just can't reconcile myself to that, but I know after we got started we took on the others. We had just one distributor at one time.

Q. This list I have would be a list of customers to which you sold directly, which had built up from 1934 to 1941; that is, the list of dealers I have in my hand, is that correct when it says that the number of towns was 212, the number of states covered was the number given, and the number of dealers?

A. That is correct. I compared this.

Q. And this has the names and numbers of those various accounts?

A. That is correct. [97]

Q. The Wed Lok accounts during that period?

A. That is correct.

Mr. Mellin: I will offer this in evidence.

(Document referred to above was received in evidence and marked Plaintiff's Exhibit Z.)

Q. (By Mr. Mellin): Now as I understand the Exhibit Z which I just handed you covers merely those sold directly by Granat salesmen, is that correct? A. That is correct, sir.

(Testimony of Joseph Norman Wineroth.)

Q. Now do you know of your own knowledge how many accounts you sold, total different accounts you sold during that period of time, including the accounts in Exhibit Z and the accounts that were sold by your distributors?

A. Well, we sold about 5000 with both methods of distribution, through our own salesmen and the distribution that we had through our distributors.

Q. That would be spread out through the whole United States? A. That is correct.

Q. And that would be 5000 different Wed Lok dealers during the period from 1934 to 1941?

A. That is correct.

Q. Now did you subsequently discontinue that method of selling—may I strike that, your Honor. I have gone a little ahead of myself. At that time did *you completely* mounted rings such as A to E, or did you sell only blanks? [98]

A. Well, first of all we sold blanks and we sold what we call semi-mounted, meaning the semi-blanks with the small diamonds in, including the center stone; then we sold completed diamond rings. We sold different styles, blanks, semi-mounted and full-mounted.

Q. The blank is without any diamonds, as I understand it?

A. The blank is without any diamonds, yes.

Q. Did you or did you not discontinue that practice?

(Testimony of Joseph Norman Wineroth.)

A. Yes, we discontinued that practice.

Q. When did you discontinue it and why?

A. When we found curtailment in our factory —when we were forced to make a little amount of merchandise due to the closing down of the factory because of men going in the service——

Q. That would be the end of 1941?

A. That is correct. Then we only sold diamond rings, we didn't sell blanks because we couldn't get enough volume to maintain our office or anything else.

Q. At that time did you discontinue selling by distributors?

A. That is during the war. Then we discontinued supplying our distributors. We couldn't supply enough rings for anybody—I mean it was a joke what we could produce—I mean if you have twenty men for the United States, we couldn't supply anybody with any quality.

Q. Now what about your records on the sale of Wed Lok rings, did you keep records for any appreciable length of time back? [99]

A. On the sale of Wed Lok rings?

Q. Yes. I mean records of sales. For example, do you have records that you can determine the number of sales of actual Wed Lok rings during the years, say, 1944, 1945 and 1946?

A. Well, I can go back maybe three or four years, but I can't go back too many years.

Q. Do you keep records in your office of the

(Testimony of Joseph Norman Wineroth.)

purchases of these rings as distinguished one from the other, from Granat Bros. in your office?

A. No, we don't. We can date that information up. I don't have a complete file on it.

Q. I have in my hand a bundle of invoices which you gave me—I think counsel has seen them (exhibiting to counsel).

Q. (By Mr. Mellin): They are for the years 1944, 1945 and 1946. Do you have any records earlier than 1944 at all?

A. I don't believe so.

Mr. Groner: May it please your Honor, the defendant is going to object to these——

Mr. Mellin: I haven't offered them as yet.

Mr. Groner: I beg your pardon. Please excuse me.

Q. (By Mr. Mellin): Can you identify on these invoices Wed Lok rings, and will you tell us how you can identify them, please?

A. By the number.

Q. By the number, you mean No. 39574 RW?

A. Yes. There is a design number. For instance, the first item [100] my attention is called to here is 39574 RW. That is a Nanette four-stone wedding ring.

Q. Are those that you have marked in that bundle?

A. Those that I have marked with a red check are Wed Lok rings.

Q. Marked Wed Lok?

(Testimony of Joseph Norman Wineroth.)

A. That is correct.

Q. And sold during the period 1944, 1945 and 1946? A. That is correct.

Q. Now you told me that you didn't keep your records past four years, of any kind, is that correct?

A. That is correct.

O. Other than totals?

A. That is correct.

Q. I added these up in your presence the other day, and the sales of Wed Lok ensembles during the year 1944 was approximately 525, in 1945——

A. I think I have those figures.

Q. You have those figures? A. Yes.

Q. Will you read them into the record, please? In these figures would be ensembles, that is, a Wed Lok wedding ring and engagement ring, is that correct? A. That is correct.

Q. Now would you read those figures into the record, please?

A. For 1944 there was 550 sets; in 1945, 254 sets; in 1946 there [101] was 530 sets.

Q. Were those, according to these invoices, distributed rather evenly throughout those years?

A. We tried to distribute them as evenly as possible, tried to give each of our accounts some portion of them.

Q. Now you heard counsel this morning asking Mr. Joseph Granat if it were correct that certain Wed Lok dealers were unable to obtain Wed

(Testimony of Joseph Norman Wineroth.)

Lok rings during the war years of 1942, 1943, 1944, 1945, and 1946. What have you to say of that?

A. Just repeat that question again.

Q. I will reframe it. You heard Mr. Groner read portions of the deposition of Mr. Joseph Granat? A. Yes.

Q. In which the deponents who are Wed Lok dealers, stated that they were unable to obtain Wed Loks during the war. Would you tell us about that, please?

A. Well, it is only natural—we only produced a few—but whatever we did get we distributed to some of our accounts. There may have been an account here and there that didn't get a set, but others got maybe two or three sets, but we tried to distribute them. We can't break them up, but we did the best we could.

Q. What did you territorially, if you know?

A. We tried to distribute them equably, that is, give each of [102] our customers a fair share of what we produced.

Q. Now Mr. Groner particularly spoke of an account—I don't have the witness—Mr. Groner particularly spoke of a man—not in Portland, south of Portland—what was it?

Mr. Hursh: Salem.

Mr. Mellin: Salem, yes. The witness' name was Jackson. Mr. Jackson said he was unable to obtain Wed Lok rings during the war. Do you know the reason why?

(Testimony of Joseph Norman Wineroth.)

A. Frankly, I don't recollect, but when we sold Mr. Jackson Wed Loks or anything he wasn't one of our customers. He wasn't established in the town. I believe the man was in the service—I don't know—when he got out of the service he worked for one of the other stores there and he established his business there and he probably contacted our salesman, and we don't just open up accounts promiscuously; we wait until the time when we feel that we want to sell them, and that is what he is referring to, I believe.

Q. I see.

A. We have no objection to selling him now.

Q. Now from your knowledge of the business of Granat Manufacturing Co., do you know what proportion during the years 1936, 1937, 1938, 1939, 1940, and 1941—what proportion of your total sales was represented by Wed Lok rings?

A. Yes, about 25 per cent of our sales were represented by Wed Lok rings. [103]

Q. And that is in dollar value?

A. That is correct.

Q. Now, do you have with you for those years the sales of the Granat Manufacturing Co., the years I just mentioned?

A. I have a group——

Q. And they were obtained from your books?

A. They were. What was the first year you asked?

Q. 1936.

(Testimony of Joseph Norman Wineroth.)

A. 1936 there was $604,706.03; in 1937, $753,-768.65; in 1938 there was $556,412.24; in 1939 there was $655,907.13; in 1940, $731,923.28; in 1941 there was $854,442.72.

Q. Now do you have the years from June, 1946, to June of 1947?

Mr. Groner: Counsel, may I interrupt you just a moment?

Mr. Mellin: Sure.

Mr. Groner: Am I correct in understanding that is the total?

Mr. Mellin: That is total of Wed Loks.

Q. Do you have that for the period from June, 1946, to June of 1947?

A. $1,848,194.42.

Mr. Naylor: What period?

Mr. Mellin: That is June, 1946, to June, 1947. I might explain there was a change in the fiscal year——

Mr. Naylor: Is that a ten-month period?

Mr. Mellin: No, a twelve-month period; June of 1946 to [104] June of 1947.

Mr. Naylor: I beg your pardon.

Q. (By Mr. Mellin): Do you have that same period for 1947-48? A. $2,624,200.68.

Q. Now for the period 1946, 1947, 1948 and 1949 that you read what percentage to your knowledge was that Wed Lok?

A. Well, our Wed Lok business today or since right after the war when we started producing again represents 50 per cent of our sales.

(Testimony of Joseph Norman Wineroth.)

Q. 50 per cent?

A. That is correct.

Q. I notice there is quite a difference, the early sales were listed in the neighborhood of 800,000; now in 1946 and 1947 it is a million and some hundred thousand. Does the fact you stopped selling blanks have anything to do with it?

A. Well, there are two reasons for that: In the first place we stopped selling to distributors. When we sold them we sold blanks. Today we sell complete diamond rings through our own sales force. That accounts for the differential. We had three men then; today we have eight men. We sold blanks then; today we sell complete rings.

Q. So the actual number of rings, ensembles, that went to the customers, were probably just as great in those days as now?

A. That is right.

Q. As I understand it, after the war was over you adopted a new [105] policy of selling by having your own salesmen. When was that?

A. That was right in 1946, as soon as we got back into production and were able to get men, we increased our sales ourselves and went after business.

Q. You no longer have distributors?

A. No distributors, only sell direct.

Q. By the way, approximately what is the retail value of those rings A to E, do you know? Take any of them.

(Testimony of Joseph Norman Wineroth.)

A. I would say they would sell anywhere from $225 to $1500.

Q. In that one group? A. Yes.

Q. Then you establish your own accounts by your salesmen? A. Correct.

Q. And you handed me a list yesterday of Wed Lok dealers during the year 1947 to August, 1948, number of towns 602, number of states 47, also the Hawaiian Islands and Washington, D. C.; number of dealers 1069, and following a list of dealers and the various towns in which they were located. Is that list true and correct as represented on the cover thereof?

A. That is correct, sir.

Q. And those are all Wed Lok dealers, are they? A. I would say so.

Mr. Mellin: I offer that list in evidence as next in order.

(List of dealers and towns was thereupon received in evidence and marked Plaintiff's Exhibit AA.) [106]

Q. (By Mr. Mellin): By the way, do you have —he introduced a circular letter this morning; do you have that exhibit? Where is the circular letter? May I be indulged, your Honor?

Q. I show your letter which counsel referred to this morning as being sent as a circular letter dated August 13, 1948, and addressed to our customers, signed, "Granat Manufacturing Co." Can you identify that letter?

(Testimony of Joseph Norman Wineroth.)

A. Yes, this is the letter that was sent to our customers.

Q. Would you tell us, please, if they were sent to your customers as of your books at that time or a portion of them, or just in any abandon?

A. Oh, no, they were taken from our records, our books of customers who have bought our Wed Lok rings.

Q. Do you know the reason it was necessary that letter be written?

A. It seems to me at the time there was confusion on this thing.

Mr. Naylor: I didn't get your answer.

A. There seemed to be some confusion and our salesmen were writing in asking us what we were doing—their customers or our customers wanted to know from them what we were doing about the ads that were appearing—we speak of the Feature Lock ads that were appearing, and these customers wanted to know what we were going to do about them, and they asked our salesmen what we were going to do about that, and we thought the best way to handle it in one fell swoop was to write them a letter, even those that [107] did not inquire, and let them know just how we felt about the matter.

Mr. Mellin: May we offer that letter in evidence?

Mr. Groner: It is in already.

Mr. Mellin: We don't have a number.

(Testimony of Joseph Norman Wineroth.)

Mr. Groner: It is 15.

The Clerk: Exhibit 15 in the deposition?

Mr. Groner: No, 15 in San Francisco.

Mr. Mellin: You haven't offered the deposition yet. I don't know whether it is going in or not.

Mr. Groner: I thought you said everything was going in.

(Document referred to was received in evidence and marked Plaintiff's Exhibit BB.)

Q. (By Mr. Mellin): Now, are you familiar with, and from your knowledge know, of the advertising—I am differentiating the retail from wholesale—as I understand, you don't have anything to do with the retail advertising?

A. Nothing whatsoever.

Q. The two retail stores Mr. Granat takes care of, but he has nothing to do with the wholesale advertising?

A. We discuss it between us, but it is my responsibility.

Q. That has been in the last few years. How about before the Granats were connected with it?

A. Before the Granats—we handled it in our own office—that is, as far as the financial was concerned. [108]

Q. What was done with respect to advertising of Wed Loks by Granat Manufacturing, if anything, during the years 1934 to 1941, inclusive?

A. We did a certain amount of advertising in

(Testimony of Joseph Norman Wineroth.)

the trade journals and by cards, what we call window cards, display cards, and things like that.

Q. Do you know what money, if any, was appropriated for advertising?

A. Yes, we appropriated about 3 per cent of our sales, was the amount we set aside.

Q. 3 per cent of the total sales?

A. Of the total sales.

Q. And did that all represent Wed Lok, or only some portion of that?

A. Well, at that time it didn't represent—we didn't intend it all for Wed Lok. We would spend, oh, at that time we would probably spend from 50 per cent to 60 per cent of our appropriation, when it first came out.

Q. For Wed Lok? A. Yes.

Q. And did that increase or decrease?

A. That increased as the sets, as the rings and the name became more popular. We concentrated on it. We spent a bigger percentage of our appropriation for Wed Loks.

Q. Now as I understand then, from '34 up into and including '41, [109] at least 3 per cent of the total sales of Granat Manufacturing, which you read into the record, were spent in advertising?

A. That is correct, sir.

Q. And in the early years approximately 50 to 60 per cent of that appropriation for Wed Lok?

A. That's correct.

Q. Now, how about the years '47 and '48?

(Testimony of Joseph Norman Wineroth.)

Mr. Groner: May I interrupt? Are there any records on that?

Mr. Mellin: We have no records, your Honor.

Mr. Groner: It seems to me that this is a very loose type of testimony, your Honor.

The Court: Oh, that goes to the weight.

Mr. Mellin: It goes to the weight, your Honor, and he says he had knowledge of it.

Q. Now, are you familiar with the—strike that. Were there any advertising by dealers during those years?

A. Oh, yes, quite a bit.

Q. And how do you know that?

A. Well, we subscribe to a clipping service and these ads would be clipped. What they call a tear sheet, or the actual ads, would be sent to us by this clipping service, by this bureau. We have subscribed to that service for many years.

Q. Would those ads, or would they not, pass through your hands? A. Oh, yes. [110]

Q. Did you contribute in any fashion to the dealers' advertising?

A. Well, not in that—the only thing we did for the dealer was to supply him with a prepared mat, or we would pay none of his space, as we would not pay for his space.

Q. In other words, you would furnish the distributors with mats and your customers with mats?

A. Well, we furnished our customers with mats. The distributors bought their own mats. That is,

(Testimony of Joseph Norman Wineroth.)

we prepared the copy and the plate and would turn it over to the companies that made the mats, and they would order their mats in conjunction with ours. That is, those that we distributed.

Q. By the way, when you said that you kept records not longer than four or five years back, that included everything except total sales, and so forth, isn't that correct? A. That's correct.

Q. Talking of mats, I hand you two sheets labeled "Wed Lok" which appear to be sort of a conglomerate of a number of mats, and I ask you if you can identify them (handing to witness).

A. Well, these mats would appear at about '35 or '36—in through there.

Q. In through that period?

A. I would say so.

Q. And those various mats—those were sent to customers, were they, and distributors?

A. That is correct. [111]

Q. And part of the advertising went to the preparation of th*at* mats? A. Oh, yes.

Mr. Mellin: May I offer those in evidence as Plaintiff's next in order?

The Clerk: CC.

(Sheets labeled "Wed Lok" were thereupon received in evidence and marked Plaintiff's Exhibit CC.)

Q. (By Mr. Mellin): Now, I asked you to locate all the mats you could find during that period,

(Testimony of Joseph Norman Wineroth.)

and you told me those are the only two you can locate other than those that perhaps went in with your deposition? A. That is correct.

Q. You kept no copy? A. No.

Q. Now, have you made any effort to locate advertisements by your dealers, that is, newspaper advertisements? Or is that the form it usually took, newspaper advertisements, your dealers?

A. Well, yes.

Q. In the early years?

A. Yes, and radio——

Q. The early years?

A. Yes, '34 to '41. That would be mostly newspaper.

Q. Mostly newspaper? A. Yes. [112]

Q. And those are the clippings that you spoke of that would come to you? A. Yes.

Q. What became of those clippings after they would pass through your hands?

A. Well, when they passed through my hands, I would send them to the salesman in whatever particular territory that was represented there. I would send it to the salesman so that he could look at them.

Q. What was the purpose of you and the salesman looking at them?

A. Well, to know what our customers were doing, and then when the salesman would look at them, he would throw them away. There was no purpose in accumulating them. We would get them monthly.

(Testimony of Joseph Norman Wineroth.)

Q. And did that custom prevail all the way through, at about the time, or just before this suit was filed? A. Oh, yes, we still do it.

Q. Now, did you make any effort to locate newspaper ads by Granat, "Wed Lok" customers, during the years '34 to '41, inclusive?

A. We did.

Q. And in doing that how did you approach it? I mean, what did you do? Did you ask the dealers for them, or what?

A. Yes, we asked the dealers to look through their files and do whatever they could to dig these ads of Wed Lok in the particular years that we were interested in up. [113]

Q. And what was your usual response, if you had one?

A. Well, in most instances, they were sorry that they didn't keep a file, or they had no way of getting them; but we did manage to get quite a number. We had some response. I think it was——

Q. Now, the ones that you have got, is that from your knowledge of them passing through your hands? Was that a small or a large proportion?

A. That was a very small percentage of it. I mean, you don't—I don't think in any field you can——

* * *

Q. (By Mr. Mellin): Now, we were speaking of the dealer advertisements and newspapers. What you said with respect to accumulating them

(Testimony of Joseph Norman Wineroth.)

from 1934 to 1941, inclusive. Did that—or attempting to find them for the years '47 and up to August of '48, when this suit was filed?

A. That is correct, sir.

Q. And as I understood you, you were able to locate but a small portion of those ads?

A. That is true.

Q. Now, you supplied me with separate tear sheets bound in three volumes, which are labeled "Advertisements Prior to August 3, 1948," and were those Wed Lok—are those all Wed Lok ads by dealers?

A. Well, I will have to see them again.

Q. Will you take a look?

A. May I come over there?

Q. I will put them on the desk here, if I may, on the table.

A. Well, if you will put them here (indicating). [114]

Q. Volume 1, volume 2 and volume 3, and they are bound at the bottom (placing on witness stand in front of witness.)

* * *

Mr. Mellin: May I offer those in evidence as Volume 1 being one exhibit and Volume 2 as one exhibit and Volume 3 as one exhibit?

The Court: Yes.

The Clerk: DD, EE and FF.

(The three volumes of Wed Lok ads referred to were [115] received in evidence and marked

(Testimony of Joseph Norman Wineroth.)

respectively Plaintiff's Exhibit DD, EE and FF.)

Mr. Mellin: May I state for the record and for Mr. Groner's benefit that those are not bound chronologically; they are bound chronologically by dealer. It doesn't appear, but I shall furnish a list. I will have a list that I will offer that shows all the ads, and where they appear, so that there will be no need to examine them.

Q. (By Mr. Mellin): Now, Mr. Wineroth, I hand you lineage report of retail advertising, Wed Lok rings, prior to August 1, 1941, and to your knowledge was this list made from these exhibits (indicating)?

Mr. Groner: Excuse me. You said '41.

Mr. Mellin: I beg your pardon. That should have been prior to August 1948.

Mr. Groner: Was this a compilation or a lineage report shown in that?

Mr. Mellin: It is a list of lineage shown, giving the State and city.

Mr. Groner: I don't care about that; but it is a compilation of the material in those three volumes and nothing else?

Mr. Mellin: And nothing else.

Mr. Groner: You and Mr. Wineroth checked it yourselves?

Mr. Mellin: Yes.

Mr. Groner: All right; that is satisfactory. [116]

Mr. Mellin: And it gives the date of the publica-

(Testimony of Joseph Norman Wineroth.)

tion, which is true whether it is a photostat or an actual tear sheet or a photostat of a tear sheet.

Q. Is that a correct compilation?

A. That is a correct compilation.

Mr. Mellin: And I offer that in evidence as the plaintiff's next in order.

Mr. Naylor: Do you have a copy of that?

Mr. Mellin: I do, but I have only one. They were supposed to make three, but they didn't.

The Clerk: GG.

(Compilation of contents of three previous exhibits was received in evidence and marked Plaintiff's Exhibit GG.)

Q. (By Mr. Mellin): Do you subscribe, or your firm or associates subscribe, Advertising Check Bureau, I & C, for lineage reports on retail advertising cost reports for Wed Lok rings?

A. We do.

Q. And did you or someone in your behalf request such a detailed report for all daily and Sunday newspapers in all cities for the month of July 1948? A. We did.

Q. I hand you—would you tell us, please, what that service is?

A. Well, it is a clipping service. Now, we not only get—they not only clip our own ads, but they clip our competitors [117] ads. We want to know what our competitors are doing, so as to see what progress we are making. They not only send us—

(Testimony of Joseph Norman Wineroth.)

you see, they send us our own ads, and they also give us on the ads our competitors put in, like Art Carve or Feature Lock or any organization. We get all the information. The ads that appear in all the various cities, we subscribe to them.

Q. Now, referring to——

A. Because it is each competitor, and how much space they took and how much money he spent.

Q. Now, with particular respect to Wed Lok, I have in front of me a report which you handed me, which gives the lineage of Wed Lok ads appearing for the month of July 1948, and I ask you if that is the report of that bureau for that period (handing to witness).

A. That is correct.

Q. Now, what information, generally, does that give you? Starting from the left-hand column, please——

Mr. Groner: May it please your Honor, before we get into any detail of that, I should like to register an objection to either the introduction of the material in evidence or testimony based upon the material. First off, it is after the date of the notification by plaintiff to the defendant. Second, it is pure and unadulterated hearsay.

The Court: Sustained.

Q. (By Mr. Mellin): Now, with respect to advertising by [118] Granat Manufacturing Company in national advertisements, do you advertise, and

(Testimony of Joseph Norman Wineroth.)

have you advertised in any magazines prior to August 1948——

Mr. Mellin: And I submit, your Honor, that that is the correct date. This suit was brought at that time, and that is when the rights accrue here. Now, we don't know precisely when they adopted the——

The Court: Well, I sustained the last objection on the hearsay ground. It was not as to the date.

Mr. Mellin: Yes, on the hearsay ground. Thank you.

Would you read that to me? I am sorry.

(Previous question read.)

Q. (Continuing.) That is, advertised the word "Wed Lok"? A. We have.

Q. And I hand you the Northwestern Jeweler for August 1948, and ask you if those ads were put there at the instance of Granat Manufacturing Company (handing to witness), and I ask you if you can identify it.

A. Yes. This is our Wed Lok ad. This is the Northwestern Jeweler; that is the ad that appeared there.

Q. What sort of a publication is that?

A. It is a magazine that is what we call a sectional magazine. Is that the Northwestern?

Q. Northwestern, yes.

A. That is a sectional magazine, a jewelers' magazine that [119] goes in that Northwestern section. It is devoted to the jewelry trade in that area.

(Testimony of Joseph Norman Wineroth.)

Mr. Mellin: May I offer this photostatic copy of the ads in evidence as Plaintiff's next in order?

The Clerk: HH.

(Copy of ads appearing in Northwestern Jeweler was received in evidence and marked Plaintiff's Exhibit HH.)

Mr. Groner: No objection.

Q. (By Mr. Mellin): I hand you photostats of certain pages of the Jewelers' Circular Keystone, of the issues of June 1947, August 1947, March 1948, May 1948, June 1948, July 1948 and August 1948, and I will ask you if those Wed Lok ads appeared in those publications as indicated (handing to witness). A. They did.

Q. And those are Wed Lok ads for Granat rings? A. These are all Wed Lok ads.

Q. And what is the Jewelers' Circular Keystone?

A. That is a trade magazine that is distributed nationally. It is distributed all throughout the country.

Q. Who does it go to?

A. It goes to all the retail and wholesale jewelers, or practically anybody in the jewelry business.

Mr. Mellin: May I offer that in evidence as next in order, those particular pages, if your Honor please?

The Clerk: II. [120]

(Copies of ads in Jewelers' Circular Key-

(Testimony of Joseph Norman Wineroth.)

stone referred to were received in evidence and marked Plaintiff's Exhibit II.)

Q. (By Mr. Mellin): I hand you a photostatic copy of one of the pages of the National Jeweler, issued in August 1948, and I ask you if that ad appeared, that Wed Lok appeared (handing to witness). A. That is correct, sir.

Mr. Groner: We assume that.

A. That is a national magazine. That goes in nationally.

Q. (By Mr. Mellin): Now, I hand you the Pacific Goldsmith for February, April, May, June, July and August (handing to witness).

A. That is a section, on the Pacific Coast.

Q. And those are all Wed Lok ads that were put in this publication? A. Yes, sir.

Mr. Mellin: I offer those as the next two in order.

The Clerk: JJ and KK.

(Copy of ad in National Jeweler and copies of ads in Pacific Goldsmith were received in evidence and marked Plaintiff's Exhibits JJ and KK respectively.)

Q. (By Mr. Mellin): Now, I hand you a pamphlet containing various photostats of ads appearing in Vogue for June 15, 1947, August 15, 1947, October 15, 1947, May 1, 1948, June 1, 1948, August 15, 1948, and I ask you if those are all Wed Lok ads

(Testimony of Joseph Norman Wineroth.)

which were caused to be published in Vogue (handing to witness). [121] A. They are, sir.

Q. Now, that has a national circulation, of course? A. Yes.

Q. Now, by the way, do you know the cost of such a one-page ad, like this, in Vogue?

A. It would run around $3500 to $4000, I am quite sure, sir.

Mr. Mellin: May I offer that as plaintiff's next in order?

The Clerk: LL.

(Copies of ads appearing in Vogue referred to were received in evidence and marked Plaintiff's Exhibit LL.)

Q. (By Mr. Mellin): I hand you a photostat of full-page ads appearing in Southern Jeweler of August 14, 1948, and ask you if that is a Wed Lok ad (handing to witness).

A. That goes to the Southern States, the same as the other sectional magazines; it goes to the Southern dealers.

Q. I hand you the same for July '48 and August '48, of the Mid-Continent (handing to witness).

A. That is the same sort of a magazine, for the Middle West.

Mr. Mellin: May I offer those two as plaintiff's next in order?

The Clerk: MM and NN.

(Testimony of Joseph Norman Wineroth.)

(Ads in Southern Jeweler and Mid-Continent were received in evidence and marked Plaintiff's Exhibits MM and NN.)

Q. (By Mr. Mellin): Now, other than advertising by dealers and [122] newspapers, and advertising in those publications of Wed Lok, does Granat do any advertising display, such as counter cards that I have in my hand (indicating)?

A. Oh, yes.

Q. Now, I hand you one of them, which says, "Two become one in Wed Lok for America's bride, rings by Granat," and I ask you if you can tell us what it is, how it is used and approximately when it was produced (handing to witness).

A. Well, this particular card was produced at the beginning of '48, I believe. I am almost positive it was.

Q. And can you tell me, please, how many were produced?

A. Well, we ordered a thousand of these.

Q. And what are they used for?

A. Well, they are used for either—either a jeweler will put them on his show case or put them in his window, and he may put them in a window with—in conjunction with a display of rings. He uses them in both places, in the window and on the show case.

Q. And will you tell us, if you know, how those were distributed? Were they distributed to all your dealers or the majority of them, or what?

(Testimony of Joseph Norman Wineroth.)

A. Oh, yes, they were sent to all dealers, whatever we had on the mailing list at the time.

Q. I hand you another counter card, seen in Vogue, with Wed Lok, and if that is a counter card for the same purpose? [123]

A. As the other. This is for the same purpose as the other.

Q. Now, can you tell us how many of those were ordered?

A. We ordered 1500 of these, of this particular one.

Q. And when?

A. Well, this was just recently, I believe; it is in '48, the latter part of '48. The customers' list was growing, and I guess we needed more of them.

Mr. Mellin: I offer them in evidence as plaintiff's next in order.

The Clerk: OO and PP.

(Counter cards used by jewelers and counter card appearing in Vogue were received in evidence and marked Plaintiff's Exhibits OO and PP.)

Mr. Groner: May it be understood that defendants' objection to anything after the date of notice is preserved, your Honor?

The Court: Very well.

Q. (By Mr. Mellin): Now, I hand you circulars marked "Wed Lok Rings by Granat," and

(Testimony of Joseph Norman Wineroth.)

in which appears in writing "200,000 printed 1947." Whose writing is that (handing to witness)?

A. That is my writing.

Q. And would you tell us, please, what those circulars are and what is the meaning of the writing?

A. Well, the writing shows the amount we ordered. In other words, we ordered 200,000 of them, and they are what we call [124] a pamphlet.

Q. What is done with them?

A. Well, we give them to our dealers, and they imprint their name on them and distribute them to their customers. It shows our Wed Lok rings; it is complete.

Q. Now, what significance, if any, does the date 1947 have?

A. Well, this particular group of rings?

Q. I mean on the front of it, 200,000, 1947.

A. Well, we ordered 200,000 in 1947.

Q. Oh, that is what it means? A. Yes.

Mr. Mellin: I will offer that in evidence as plaintiff's next in order.

The Clerk: QQ.

(Advertising pamphlet referred to was received in evidence and marked Plaintiff's Exhibit QQ.)

Q. (By Mr. Mellin): I have a second pamphlet of a similar nature which states on it "150,000 ordered between January and August 1948," marked

(Testimony of Joseph Norman Wineroth.)

"Wed Lok Rings by Granat" (handing to witness), and I ask you if that pamphlet serves a similar purpose.

A. Well, this is the second one. This one came out after that one (indicating).

Q. In other words, those were published, or those were issued, during the dates appearing thereon?

A. That's right, and we increased the size of it, you will [125] notice, because we had a few new rings, and we wanted to increase it, so we ordered 150,000 of these in 1948.

Q. And those are likewise distributed to your customers? A. The same effort is used.

The Clerk: Exhibit RR.

(Advertising pamphlets marked "150,000 ordered between January and August 1948" were received in evidence and marked Plaintiff's Exhibit RR.)

Q. (By Mr. Mellin): Now, I hand you a series of display cards displaying the words "Wed Lok Rings by Granat," "Interlocking Series," "New Diamond Rings by Granat," and so forth; and they are all marked apparently with the date. Would you tell us if those were produced on those dates, and issued, and if so, how many and to whom (handing to witness)?

A. Well, these two were brought out in 1947, and these are the cards that are used in connection with a display fixture. Now, each year we

(Testimony of Joseph Norman Wineroth.)

change the fixture, and we try to change the card somewhat. These two were produced in '47, and this group here of five were produced in '48. Now, here is the two that we produced this year, for fixtures, for the windows (indicating).

Mr. Mellin: May I offer all of those——

Q. And they are put on trays on the counter?

A. Yes.

Q. And how many of those were made?

A. Well, we made, of this one here, about 600, and of these [126] here about a thousand in all. That is, not a thousand of each, but of the group—we would order 200 of this, 300 of that—I just can't give you the exact figures. But there is about a thousand in all. I know that because we order a thousand fixtures and we need a thousand cards to go on the various fixtures. You see, there are five different types of fixtures there.

Mr. Mellin: May I offer those as one exhibit, your Honor?

The Court: Yes.

Mr. Mellin: Next in order.

The Clerk: SS.

(Miscellaneous display cards were received in evidence and marked Plaintiff's Exhibit SS.)

Q. (By Mr. Mellin): Now, with respect to Wed Lok ads by dealers, you notice that Wed Lok is, for example, on this mat, Exhibit CC, it appears in some sort of a script in some places. Is it a fact

(Testimony of Joseph Norman Wineroth.)

that the dealers' use of your mats resulted in that uniformity of display of the word "Wed Lok" throughout those ads?

A. Well, that would be correct, because in most instances we either supply a mat of a complete ad, or we supply the material that the jewelers can make up their own ads from. We would supply them with what we call the "cut" of the name and the ring, the rings themselves, and they make up their own ads. But in most instances, the smaller jewelers in particular use our [127] prepared mat of an ad.

Q. Now, Mr. Groner this morning called attention to Mr. Granat of the body of an ad by Mr. Giaccobi, in which the ad says, "These two rings are wedlocked together." Was that a part of any of your advertising?

A. Well, if I could see the ad, I could tell you.

Q. He had reference to Plaintiff's Exhibit 23 to Giaccobi's advertisement. Is there any mat or anything there supplied by Granat Bros. or Granat Manufacturing (handing to witness)?

A. No; the only thing that he has that we supplied was this here (indicating).

Q. By "this here" you mean the way "Wed Lok" is displayed?

A. We supplied this, this here (indicating).

Q. "Wed Lok"?

A. "Wed Lok." We supplied this drawing.

Q. The drawing of the ring?

(Testimony of Joseph Norman Wineroth.)

A. That is correct. Now, the rest——

Mr. Groner: Pardon me, please.

The Witness: Surely.

Mr. Groner: Mr. Mellin, I don't like to take exception to what you said, but the witness has pointed to the entire statement at the top of the advertisement, which is the only thing that I referred to in cross-examining Mr. Granat this morning.

The Witness: Now, wait a minute—— [128]

Mr. Mellin: You said he referred to Wed Lok.

A. I am referring to this, sir; we don't supply that.

Mr. Mellin: You don't supply what? Will you read it?

A. We don't supply a man—if you want to show that material, I will show you. We supply five——

Mr. Groner: I just want to know about this——

Mr. Mellin: You said, "We don't supply that." Will you read that.

A. That word "Wed Lok," we have that written out in script. I can give you that in five different sizes for a merchant to make up his ad; he can make it up in five different sizes. We supply five different sizes of ads the dealer makes up himself. They have their own agency. They make their own ads.

Q. And this statement, "These are the rings that together" is his own words?

(Testimony of Joseph Norman Wineroth.)

A. That is correct. That has nothing to do with us.

Q. Now, prior to—By the way, when did you first see the trade-mark Feature-Lok in connection with diamond rings, if you recall?

A. Let's see. I think that was in 1947 or—the latter part of 1947 or 1948. I don't know; I just can't reconcile myself to that now. I think it was 1947.

Q. Well, this suit was filed in August 1948. Would that refresh your recollection?

A. I guess it was 1948. [129]

Q. Prior to the time you saw that trade-mark "Feature-Lok" used in connection with diamond ring ensembles, at any time had you ever seen a combination trade-mark incorporating the word "Lok" in it—— A. I never had.

Q. Wait a minute.——to be used in connection with diamond rings? A. I never had.

Q. So that during the period you sold Wed Loks, that is, from 1934 to 1948, or up until the time you saw Feature-Lok in 1948 you had never seen the word "Lok" incorporated in any trade-mark applying to rings?

A. I never had seen the word—well, yes. Now, wait a minute. There was a firm in New York, Untermeyer & Robbins——

Q. When was this?

A. I think in 1947, the firm of Untermeyer & Robbins brought out an ad in one of the national

(Testimony of Joseph Norman Wineroth.)

magazines and it used the word—I may be wrong on this, but I am almost positive of my statement, they used the word "Wed-Lock" and we called their attention to it, and they immediately wrote back to us and told us they were sorry, they didn't know that that was our property, or whatever the correct term to use, and they mentioned that they would stop using it and they apologized and said that there may be one or two ads that would appear with that name in it, because they had given out some mats to their [130] customers, and they would do everything they could to recall them.

Q. Now, other than that, Mr. Wineroth, you had never seen the word "Lock" incorporated in a trade-mark?

A. That is the only time I ever saw the word "Lock" connected with rings other than our own Wed Lok ring.

Q. That is the first time?

A. That is the first time.

Q. Now, are you familiar with the Kay Jewelry Company? A. I am.

Q. Will you tell us very briefly their size and proportion.

A. Well, the Kay Jewelry Company is a chain of jewelry stores with their offices—that is, their main offices are in Washington, D.C. I think they have about 200 retail stores throughout the United States.

(Testimony of Joseph Norman Wineroth.)

Q. How do they compare in size with other retail jewelers?

A. Well, there is no other group of jewelers or chain of jewelry stores that are equal in size.

Q. Now, do you recall that sometime during the middle part of 1948 that the Kay Jewelers came out with a diamond ring ensemble marked "Tru Lock," T-r-u L-o-c-k? A. I do.

Q. Do you recall that suit was brought against them for infringement of Wed Lok, a suit similar to this in Los Angeles? A. I do. [131]

Q. And do you recall that in that suit judgment was entered against the Kay Jewelry Company by consent that the word "Tru Lock"—they would be enjoined from using it in connection with this?

A. I remember that.

Mr. Mellin: May I offer in evidence a certified copy of the judgment in that suit, your Honor, and certified copy of complaint therein.

The Clerk: One exhibit?

Mr. Naylor: That is objectionable. I don't think that is germane to any issue in this case.

The Court: Neither do I.

Mr. Mellin: Pardon me?

The Court: The objection is made it is not germane. Counsel says he doesn't see how it is germane. I said, "Neither do I."

Mr. Mellin: Your Honor, that just goes to show that others—using their contention—a large jewelry concern using that trade-mark had acceded to the judgment it was infringement.

(Testimony of Joseph Norman Wineroth.)

The Court: Do you press your objection?

Mr. Naylor: Just one moment, your Honor. Withdraw the remark.

(Copy of complaint and judgment in Los Angeles action were received in evidence and marked Plaintiff's Exhibit TT.) [132]

Q. (By Mr. Mellin): Now, from your knowledge of the advertising that was done by jewelers during the years 1938, 1939 and 1940—and you have knowledge of the advertising by dealers during the years 1947 and 1948? A. I do.

Q. How would you say it compared in amount of advertising by dealers of the word "Wed Lok," from your knowledge?

A. Just repeat the question again?

Mr. Mellin: Will you read the question.

(Question read.)

Mr. Groner: Read the previous question.

Mr. Mellin: How did it compare in volume?

Mr. Naylor: How did what compare?

The Court: The question isn't clear to me.

Q. (By Mr. Mellin): The advertisement of Wed Lok by dealers in 1938, 1939 and 1940, any one year, as compared with either of the years 1947 and 1948.

A. Well, 1947 and 1948 were both greater than 1938.

Q. How much greater, to your knowledge?

A. I would say double—hundred per cent more.

(Testimony of Joseph Norman Wineroth.)

Q. How would it compare geographically?

A. Geographically it would be the same. We had the same distribution—I mean as far as dealers using our products are concerned, geographically it would be the same, the 48 States.

Mr. Mellin: That is all. Just one moment. There is one [133] thing I neglected. May I indulge?

Mr. Naylor: Yes, sir.

Q. (By Mr. Mellin): By the way, when Wed Lok rings are sent from your establishment to dealers, are they tagged in any fashion?

A. Yes, they are.

Q. I hand you a sheet on which is pasted a gold and platinum tab marked "Granat Wed Lok," an envelope marked "Wed Lok Rings by Granat," and ask you what they are and how they are used.

A. These tags are used on the rings. If it is a gold ring, we put on the gold ring tag, and the same thing would apply to platinum. This here mark with tissue paper is placed in this receptacle and then put in the envelopes and shipped to the customers.

Q. How long has that been the practice?

A. Well, ever since we got back into production in 1946.

Mr. Mellin: I offer that in evidence as next in order.

(Gold and platinum tabs received in evidence and marked Plaintiff's Exhibit UU.)

Q. (By Mr. Mellin): Now, one question, Mr.

(Testimony of Joseph Norman Wineroth.)

Wineroth: Have all the Wed Lok rings you have mentioned that you sold to your knowledge been stamped inside "Wed Lok"?

A. They have.

Q. I mean—you don't stamp all of them?

A. I don't stamp each one separately, but they are supposed to [134] be. That is the instructions.

Mr. Mellin: That is all.

Cross-Examination

By Mr. Naylor:

Q. Mr. Wineroth, on direct examination reference was made to this sheaf of invoices headed "Granat Manufacturing Company" for the years 1944 and into 1946. Will you examine them again. What company issued those invoices?

A. Well, these were issued by Granat Bros.

Q. What name does the invoice bear as heading?

A. Well——

Q. Just a minute. What name is borne*d* by the heading of the invoices?

A. The heading of the invoices is called "Granat Manufacturing Company."

Q. And who is the debtor or the buyer shown on the invoices?

A. L. A. Giacobbi and Company.

Q. So that on the face of those invoices the seller and the buyer are one and the same, aren't they?

A. No.

Q. On the face of the invoices?

(Testimony of Joseph Norman Wineroth.)

A. No. If you will come here I will show you something. This is marked "Granat Manufacturing Company," address 2390 Mission Street. Now, the retail store and the factory was separated. We tried to keep our sales separate, so the factory billed us. That is in there; you will find "Granat Manufacturing [135] Company, 2390 Mission Street." We did that until we moved the factory to 114 Geary Street. It was a bookkeeping figure, is all. I think you will find that——

Q. What do you mean, "bookkeeping figure"? I don't follow you.

A. I don't mean a bookkeeping figure. It was done to simplify bookkeeping in the plant, to know what was billed dealers, and so forth.

Q. I still don't follow you, sir, on the matter of the invoices having Granat Manufacturing Company at the top and billing L. A. Giacobbi and Company.

A. Well, L. A. Giacobbi and Company is a corporation.

Q. But it uses the fictitious name and style of Granat Manufacturing Company?

A. That is correct.

Q. Isn't that a bill from the corporation to itself? A. No, definitely not.

Q. I don't follow you.

A. I am sorry you can't.

Mr. Mellin: Can you explain it in detail?

The Witness: I can explain it.

Q. (By Mr. Naylor): I wish you would. I think the Court is confused, too.

(Testimony of Joseph Norman Wineroth.)

A. What was the question you want to know now?

Q. Isn't that an invoice from the corporation to itself? [136] A. No.

Q. Why not?

A. I just got through explaining to you this is Granat Manufacturing Company—this actually is Granat Bros.——

Q. Is that true of all those invoices?

A. All of these invoices? I don't know. I haven't checked them all, but I think it is. When the wholesale department of Granat Bros., when they bill out to us, they bill out under the name of Granat Manufacturing Company. They still bill us from Granat Manufacturing Company to L. A. Giacobbi and Company.

Mr. Mellin: Why?

The Witness: Frankly, I can't answer that.

Q. (By Mr. Naylor): Well, do these——

A. Frankly, I can't answer that.

Q. Are we to understand from the answer you have given that Granat Bros. also employ the name Granat Manufacturing Company as a fictitious name and style?

A. All I know is that in their wholesale department to the factory—or to the wholesale division they bill under the name of Granat Manufacturing Company.

Q. Do they make any other use of Granat Manufacturing Company?

(Testimony of Joseph Norman Wineroth.)

A. I couldn't answer that. I don't know what they do, I only know what we do.

Mr. Mellin: Who would know?

The Witness: I think Mr. Granat could answer that. I [137] think Mr. Quick would be able to give you a better answer than anybody. He is the comptroller.

Q. (By Mr. Naylor): Will you thumb through that collection of so-called invoices and state whether or not there is on the face of any of them—it will only take you a second—I am sure—any invoice in that collection other than one from Granat Manufacturing Company to L. A. Giaccobi Company?

A. If there is one invoice? What is that question?

Q. Are they all the same? That is all I want to know, as to the so-called seller and so-called buyer.

A. Oh, I think so—all those I examined so far are the same. Do you want me to go through them all?

Q. I have been through them. I couldn't find any. Are they all the same so far as the so-called seller and buyer? A. Yes, I think so.

Q. Thank you. Now, on direct examination your attention was drawn to the topmost invoice and you referred to a design number, 3957-4RW, and I think you testified that was a style number, is that correct? A. That is correct.

Q. Do you have a list of the various style numbers that have been sold by Granat Manufacturing Company under the trade-mark Wed Lok?

(Testimony of Joseph Norman Wineroth.)

A. I think I could give them to you.

Q. Could you supply us with such a list? [138]

A. I think so, yes.

Q. Could you do that by tomorrow morning do you think?

A. What time tomorrow morning?

Q. Any time during the morning session.

A. I think—that is pretty hard. If you give me a little more time—I would rather have more time.

Q. Any time during the course of this trial.

A. All right. What is it you want again?

Q. A list of style numbers which have been employed by Granat Manufacturing Company or Granat Bros. for rings which have been sold by either of them under the trade-mark Wed Lok.

A. I can give you that.

Q. Did you use such a list at the time these were prepared? A. Sure.

Q. Would you have it in the company records?

A. I think I can find it for you.

Q. That is in the period——

A. In fact, if you want to know, I think I can even find you those Wed Lok rings—that is, a Nanette ring, if that is what you are driving at, that is a Nanette ring. That is the old ring right here. I will show you that number stamped on the die.

Q. I am not concerned with that. I would like to see the list of rings that were extant at the time these invoices were made up, for the period beginning January, 1944, and ending March, 1946.

(Testimony of Joseph Norman Wineroth.)

A. All right. [139]

Q. How many rings were checked off by you on the first invoice under the style number that was mentioned? A. There were three.

Q. What is the total price?

A. $4.60 apiece.

Q. What does that cover? That is a complete set of blanks, is it not?

A. The blank is $4.60, yes.

Q. By the "blank" you mean the ensemble, do you not? A. No, I don't.

Q. What do you mean?

A. I mean just the wedding ring.

Q. Just the wedding ring? A. Yes.

Q. Then the invoice 7470 did not relate to an ensemble?

A. In this particular instance it did not, no.

Q. Would you have any knowledge whether the wedding rings on invoice 7470 identified as 39574RW are marked with a trade-mark?

A. I can't answer that. I will tell you why: Sometimes we mark "Wed Lok" in the mounting, sometimes we mark it in the wedding ring. We don't mark it in both places. We put the trade-mark in one and the karat mark in one, and so forth. We don't put all the markings in one ring, because we wanted to leave some room for engraving on certain rings.

Q. On your deposition, sir, I asked you to produce records, [140] if any you had, from customers

(Testimony of Joseph Norman Wineroth.)

to Granat Manufacturing Company—by that I mean L. A. Giacobbi or Granat Manufacturing Company, whichever you choose to call it—ordering Wed Lok ensembles in the period 1940 to May of 1947. Are there any such records extant?

A. I don't think so, no.

Q. Then this particular group to which your counsel has referred do not represent orders coming from your customers, do they?

A. No, they don't represent—these represent goods that we have manufactured from the factory to us and we in turn sold them.

Q. Now, what I am concerned with is a record evidencing the sale of any Wed Lok ensembles between the years 1940 and May, 1947.

A. I don't have the evidence, but I think—we wouldn't have bought the rings unless we could sell them—we wouldn't have ordered them, rather.

Q. I presume from the production of these you have made a search——

A. I didn't have any records; you asked me for them and I didn't have them——

Q. Pardon me, Mr. Wineroth, let me finish my question. A. I am sorry, I apologize.

Q. I assume you made a very careful search for that which was [141] asked for on your deposition, namely, orders from the customers, and I assume from the fact that you have not now produced them that they are not extant? Is that a correct assumption? A. That is correct.

(Testimony of Joseph Norman Wineroth.)

Q. Did you personally participate in the selection of the witnesses who testified on behalf of this plaintiff in Portland, Oregon, Salem, Denver, Aurora, Illinois, Chicago, Illinois, Buffalo and Los Angeles?

A. Only to this extent, that we had a sales meeting here and I told our salesmen—we told our salesmen when they went out to interview any of our customers to acquaint them with the situation and if they found anybody that would—was able to give the information we wanted, we would like to have them send the names in.

Q. What information were you seeking?

A. What do you mean by that?

Q. What information were you seeking of these witnesses?

A. I wasn't seeking any information myself.

Q. What information was the plaintiff in this action seeking?

A. I think Mr. Mellin can answer that. I can't answer that.

Q. I thought you said you gave the instructions to the salesmen, didn't you?

A. I said if they found anybody that we could discuss this thing or take the depositions from——

Q. As to what? [142]

A. Well, frankly, to be truthful with you, I didn't do it myself, now that I recall it. We had somebody else do that.

Q. Who did? A. Mr. Hursh.

(Testimony of Joseph Norman Wineroth.)

Q. Mr. Hursh?

A. Yes. We called him over to the meeting, now that I recall it.

Q. Was the matter of the selection of persons who testified on the deposition junket to Portland, Salem, Denver, etc.—— A. On the what?

Mr. Naylor: Will you read the question.

(Question read.)

A. Truthfully——

Q. (By Mr. Naylor): I haven't finished the question. A. Oh, pardon me.

Q. Was the selection of those witnesses left to your counsel? A. Oh, yes.

Q. Have you read the depositions of the witnesses who testified in those places?

A. No, I haven't.

Q. Have you been told as to what they testified?

A. Some parts of their depositions, yes, just here and there.

Q. I think it is a fair statement of the depositions of those persons in the places I have named, commencing with Portland and ending in Los Angeles, to say that without exception they [143] testified they were unable to procure Wed Lok rings during the war period. Are you well acquainted with Mr. Jacob of Portland?

A. I am very well acquainted with him.

Q. How often did you see him during the war?

A. At least once a year.

(Testimony of Joseph Norman Wineroth.)

Q. He personally came down on numerous occasions, did he not, concerning his purchases from Granat Manufacturing Company?

A. Well, yes, of course.

Q. And you saw him on several different occasions during that period?

A. I saw him every time he came down.

Q. Were you ever able to deliver Wed Lok rings to him during the wartime period?

A. I think he would have got his share of Wed Lok rings, yes.

Q. He testified he couldn't get them.

A. Well, I don't know what he testified, but whatever we had he got. I can't just lay my fingers on it to say—I mean by saying that he got whatever we had, he got his share of the merchandise we were able to sell at the time.

The Court: Are you certain he got some?

A. I am positive, sir, because he is a very good customer and we gave him whatever we could.

Q. (By Mr. Naylor): I want to read you a little of his testimony and ascertain whether you will say it is a correct statement [144] or incorrect statement; at page 43, under cross-examination Mr. Jacob was asked as follows: "Now, I think you mentioned that during the war years Granat Bros. weren't making Wed Loks, is that your testimony?" His answer was, "Yes—pardon me, as far as I know. At least, they might have been making them, but we were unable to purchase any from them—at

(Testimony of Joseph Norman Wineroth.)

least, I wasn't able to purchase any from them. Whether they were making them or not, I can't tell."

Would you say that is a correct statement?

A. Well, frankly, I don't think Mr. Jacob is informed. I will tell you what happened there. I can show you these rings here—now, we brought out the Nanette Wed Lok, but as soon as the war came out we discontinued the practice of promotions of any kind. When I say "promotions" now, I am speaking about promoting names or calling them anything. We just sold merchandise. I can show you—I know he got a certain amount of this merchandise.

Q. I want to read you further, Mr. Wineroth.

A. Go ahead.

Q. "Q. In any event, you weren't able to place an order and receive the goods"? And he testified, "A. I wasn't able to order anything from them. I used to go down and get what I could from them or they sent me whatever they had whether I ordered it or not."

A. That is correct.

Q. Is that a correct statement? [145]

A. Yes. [145-A]

Wednesday, March 16, 1949—10:00 A.M.

The Clerk: Granat Bros. v. Friend and Granat Bros. v. Brown and Feature Ring Co.

Mr. Naylor: Ready, your Honor.

(Testimony of Joseph Norman Wineroth.)

Mr. Mellin: Ready, your Honor.

JOSEPH NORMAN WINEROTH

resumed.

Cross-Examination
(Continued)

By Mr. Naylor:

Q. Mr. Wineroth, yesterday we were speaking at the close of the court session about the testimony of the Granat Manufacturing Company customers concerning their inability to procure Wed Loks during the wartime period; and as I recall your testimony, it was to the effect that you had not read the depositions of these various customers whose testimony was taken on behalf of the plaintiff?

A. That is correct, sir. I glanced at it. I didn't read them thoroughly. That is, all through them.

Q. Did you happen to glance at the deposition of Mr. Philip Kleiger, of Denver?

A. No, I didn't.

Q. I find that at page 32 of his deposition, Mr. Kleiger testified as follows:

"Q. What was the wartime period during which you could not purchase the Wed Lok rings? [146]

A. I would say around 1941 and thereabouts.

Q. And that ran approximately to May, 1947, did it not?

A. Until the last Wed Loks came through.

Q. To refresh your recollection on that, I note

(Testimony of Joseph Norman Wineroth.)

that your first advertisement of Wed Lok rings after the war appears to have been Plaintiff's Exhibit 4''—referring, your Honor, to the exhibit on that deposition—

"—August 4, 1947. Would that be about the time? A. The first which?

Q. The first radio advertisement of Wed Lok rings.

A. Well, I don't know as to the dates. I didn't follow that.

Q. Well, I take it that you were unable to find an earlier radio script than August 4, 1947, is that correct?

A. That I don't know, because there were changes in advertising agencies before these people took over, and that I can't say."

Would you say his testimony was correct or incorrect as to his inability to get Wed Loks?

A. Well, Mr. Naylor, I don't know just how he pointed that out, but I think I pointed out that this whole thing here, that in the war years we produced practically very little Wed Loks, and I don't know whether he got one or two sets or what. But with [147] the amount of customers we had throughout the United States, it is very difficult for me to say who got this or who got that. Whether he got one or not, I don't know. But I do know, and I think that we have bills to show and we have production figures to show, that we produced these Wed Lok rings, and just where they went, I don't know.

(Testimony of Joseph Norman Wineroth.)

Q. Your testimony was, however, Mr. Wineroth, that you don't have those records, isn't that a fact?

A. I beg your pardon. I have them right here, sir (indicating).

Q. No, I think you are speaking of intercompany invoices, aren't you?

A. That is what I am speaking of.

Q. From Granat Manufacturing Company to itself, identified as L. A. Giacobbi?

A. Say that again, please.

You are speaking of this stack of invoices, aren't you? A. Yes.

Q. The intercompany invoices?

A. That is correct.

Q. From Granat Manufacturing Company to L. A. Giacobbi? A. That is correct.

Q. I am speaking about orders from customers.

A. Oh, we don't keep our orders that long. I would have to have a warehouse to keep all our correspondence and orders that far back. [148]

Q. Now, did you happen to glance at the testimony of Mr. Goldblatt, taken on behalf of the plaintiff? A. No, I didn't.

Q. I want to acquaint you with the fact that at pages 26 and 27 Mr. Goldblatt in his deposition testified as follows:

"Q. When was it after the war years that the merchandise under 'Wed Lok' was first available to you?

A. About three years ago at this time.

(Testimony of Joseph Norman Wineroth.)

Q. Would you fix the date? Can you fix a date on that for us?

A. As to the exact month, you mean?

Q. Approximately.

A. Oh, I would say it would possibly be in February or March of 1946. Young Giacobbi came up with it on that trip from San Francisco.

Q. Did you place an order with him at that time? A. No, sir.

Q. When did you first place your order after the war years?

A. Around a year after that.

Q. And that would be approximately when in 1947?

A. I think our first shiment of Wed Loks came in about April or May of 1947."

Would you say that Mr. Goldblatt was in error in so testifying? [149]

A. Well, I am not in a position to say whether he is right or wrong; I don't know.

Q. Did you examine the testimony of Mr. Gambler, taken at Buffalo, New York, on plaintiff's behalf? A. No, I didn't.

Q. His testimony at pages 5 and 6 was to this effect:

"Q. How long have you been selling Wed Lok rings in your store?

A. I can't remember. I have to look up the ad."

Then there is a parenthetical expression, "(Looking at papers)".

(Testimony of Joseph Norman Wineroth.)

"I think we have an announcement here. I think it is September. The first ad, I believe, came out September 3, 1947."

Would you say that is about correct?

A. Well, if he said so. How would I know whether it is correct?

Q. You are acquainted with Mr. Shapiro, who testified here, are you not? A. I am.

Q. Has it been Mr. Shapiro's practice to come to see you in San Francisco?

A. He has visited me here, yes.

Q. And you have visited him in Los Angeles, have you not? A. Yes, sir.

Q. Yesterday we asked, Mr. Wineroth, if you would make an [150] attempt to supply us with a list of the catalog numbers which have been employed by plaintiff and Granat Manufacturing Company. Have you been able to do that?

A. Well, that list is being made up now, and within the next thirty minutes or so I believe it will be here in court.

Q. Were you present yesterday when Mr. Joseph Granat was testifying concerning the trade-marks of the company listed in "Trade-Marks of the Jewelry and Kindred Trades"?

A. I was, sir.

Q. Were you present when he said that the matter of listing or supplying the statement would be the wholesale end of it? A. I was.

(Testimony of Joseph Norman Wineroth.)

Q. And by that he was referring to Granat Manufacturing Company, was he not?

A. I think so.

Q. I am going to call your attention, or, rather, I am going to call your attention to the volume, Fifth Edition, "Trade-Marks of Jewelry and Kindred Trades," and I will direct your attention to page 50 of that publication (handing to witness). Do you see there the listing of Granat trade-marks?

A. Yes.

Q. Did you supply that publication with the list which appears there?

A. Truthfully, I can't answer that question.

Q. Do you know who would have done it? [151]

A. No, I don't. I will tell you, this thing—I don't know. I mean——

Q. Do you find in that list the trade-mark "Wed Lok"? A. No, I don't.

Q. What marks do you find?

A. Buttercup, Coronet, Finger Bracelet, Hobby Bracelet, Parisian Knot, Rounded Square.

Q. Were those marks actively in use by the plaintiff in this action during the wartime period?

A. I can't answer that either.

Q. You don't know? A. No.

Q. Well, do you know whether you were selling any goods for Granat Bros. under the marks listed in that publication during the wartime period?

A. We were not selling any of this, no. With one exception there, that Stagger set thing there,

(Testimony of Joseph Norman Wineroth.)

at the top—those are trade names that are used in retail advertising, and as far as—this is not any official trade-mark book. This is a commercial thing that, unless you advertise in it, they won't put your trade-mark in there.

Q. Well, would you say Mr. Granat was in error in testifying? A. I don't know.

Q. Just a moment, sir. Would you say that Mr. Granat was in error yesterday when he testified that the wholesale end of the [152] business would be concerned with this listing?

A. We would be concerned with it, but if they sent me a letter asking me to subscribe to an ad, I might just tear the letter up and throw it away. We get that sort of thing all the time. That is no official book of any kind.

Q. You don't know who in your organization would have caused the entry to be made in the book?

A. Truthfully, I can't. We had several—I had a partner at that time. I may have been on the road, he may have sent it in. I don't know. That book is not as important an issue——

Q. Now, yesterday under direct examination you referred to Exhibits Z and AA, Z being entitled "Wed Lok dealers sold directly by Granat Manufacturing Company during the period 1934 to 1941" (handing to witness). What is meant by the expression "Wed Lok dealers" as there used?

(Testimony of Joseph Norman Wineroth.)

A. They were retail customers who are customers that we sold directly to.

Q. Are they customers of your dealing solely in Wed Lok rings?

A. I wouldn't say solely Wed Lok rings. They are dealers in all our products.

Q. Well, the term then is a misnomer, is it?

A. Well, now, that might have been—we assume that anybody that buys our products are going to buy Wed Lok rings. They buy Wed Lok rings.

Q. The proper caption for that would be "Customers of Granat [153] Manufacturing Company," wouldn't it?

A. Well, now, I am not going to answer that question. I mean, I am not a judge of that. I would say you are correct in that, yes.

Q. You would say I am correct?

A. I would say you are correct and you are incorrect.

Q. What about AA, which is entitled "Wed Lok Dealers during the Year 1947"?

A. Well, the same thing applies to that.

Q. The same thing applies?

A. The same thing applies. The one is——

Q. They were not customers of yours handling nothing but Wed Loks, were they, in these two lists?

A. Just handling nothing but Wed Loks?

Q. Yes, sir.

A. In other words, if I have a customer that

(Testimony of Joseph Norman Wineroth.)

buys certain Wed Loks and buys something else, then I can't call him a customer? Is that what you are trying to drive at?

Q. No, I am inquiring this: Is there any person listed in either Plaintiff's Exhibit Z or AA who dealt in Wed Lok rings alone?

A. There are customers in those lists that just dealt in Wed Lok rings, yes.

Q. How many of them?

A. I couldn't tell you that. [154]

Q. You couldn't segregate them, could you?

A. With two or three weeks work perhaps I could, by going through all our records.

Q. Well, to boil it down, what Z and AA actually represent are customers of yours who handle the various products offered for sale by Granat Manufacturing Company?

A. That is correct.

Q. Including Wed Loks?

A. That is correct.

Q. That is a correct paraphrase of it, isn't that correct? A. Yes, that would be correct.

Mr. Mellin: Mr. Naylor, may I ask one thing? Is the word "dealer" in your business, in this sense, used synonymously with "customer"?

The Witness: Yes, it is.

Q. (By Mr. Naylor): Now, yesterday you testified concerning the sales by Granat Manufacturing Company in the years 1935 and '36; and you then

(Testimony of Joseph Norman Wincroth.)

carried that forward to 1941, and you gave us certain totals? A. Yes.

Q. And I think you then said that 25 per cent of those several totals we cited, which were cited by you, represented the sale of Wed Lok ensembles, is that correct? A. That was correct.

Q. It is a fact, is it not, that when Mr. Granat discovered [155] that Strauss & Strauss had a Federal registration of the trade-mark "Wed Lok," there was an interruption in his use in 1935 and 1936 of that trade-mark name, wasn't there?

A. There was an interruption in—he is speaking—I think Mr. Granat was speaking of retail now, Mr. Naylor; he was speaking of the ads that we would use in the papers. We were speaking of advertising; we didn't stop the sale of the rings.

Q. Well, wasn't your testimony and Mr. Granat's testimony, too, on the discovery depositions that the reason for withdrawing "Wed Lok" was to determine what the rights were that Mr. Strauss had, so that Mr. Granat wouldn't be left in the position of an infringer of these rights? Isn't that correct?

A. Mr. Naylor, we withdrew the advertising, not the sale.

Q. Oh, but you withdrew the ads and kept on with the sales?

A. Naturally. There is nothing wrong with that.

Q. Well, now, in that particular period didn't we determine on the discovery depositions that the

(Testimony of Joseph Norman Wineroth.)

trade-mark "Wedded" was employed and that the trade-mark "Interlocking" was also employed in the period of non-use pending the determination of what rights Mr. Strauss had?

A. We may have changed our type of advertising. I assure you that when we found that they had the "Wed Lok" we discontinued advertising, but we didn't discontinue the selling of the rings.

Q. You didn't? A. No. [156]

Q. Well, under what name were they sold?

A. Well, they were just sold as rings. We still sell rings. We just sell them, that is all. It doesn't make any difference what we call them.

Q. In other words——

A. We are speaking of advertising now.

Q. No, I am speaking of the use of the trade-mark "Wed Lok" in the period following the discovery that Mr. Strauss had a Federal registration of "Wed Lok." That is the period I am speaking of. A. Yes.

Q. As I understand you now, your testimony is that you discontinued the advertising of the mark, of the goods under the Wed Lok mark?

A. That is correct.

Q. But you continued to sell the rings. Now, how were the rings marked?

A. Well, Mr. Naylor, you are going back a long time, and you are asking me something that it is awfully difficult for me to answer now in the way

(Testimony of Joseph Norman Wineroth.)

you want me to answer it. Now, just what happened during that period, you are going back to '35, '36—I know that we continued to sell them. They may have been stamped different. We may have left the trade-mark out during that period. But I can tell you that we continued to sell the rings.

Q. You are not sure, however, how they were marked? [157]

A. No, I am not, Mr. Naylor.

Q. I would like to read just one answer you gave on the discovery deposition, at page 170, concerning this one particular incident:

"Q. That is a matter which would have come to your attention at that time, though, isn't it?

A. No, it wouldn't. At that time I was more or less on the road. As I mentioned before, Mr. E. A. Giaccobi was handling the executive work in our business, and I was doing more of the selling, and I didn't pay too much attention at that time, going back that many years. I do remember, however, that one time Mr. Granat told me that some other firm,—and I believe since my mind has been refreshed on it, it was Strauss & Strauss—that owned the name 'Wed Lok', and that he wanted to be very careful about using 'Wed Lok' until such time as he felt that he wouldn't be infringing on someone else's rights, and I believe he discontinued the use of it until he could get the matter straightened out."

(Testimony of Joseph Norman Wineroth.)

That is correct, isn't it? A. Yes, sir.

Q. Now, with that testimony in mind, the figures given for the years '35 and '36 would stand some amendment, would they not?

Mr. Mellin: Just a moment now. May I have it pointed out [158] to this witness that that trademark of Strauss & Strauss was purchased in March of 1936, so don't—and I had him testify as to the year '36 and not as to '35, as I recall it. He had a different answer for '34 and '35.

Mr. Naylor: What was his answer for '34 and '35?

Mr. Mellin: You have the record. You are examining him, not me. But don't mislead the witness.

Mr. Naylor: I am not attempting to mislead him. I am trying to get at the facts.

Q. In '35, to March of '36, as Mr. Mellin suggests, what would your figures be for sales of Wed Lok rings? A. In '35?

Q. Now, I am speaking of rings sold under that name "Wed Lok."

A. Well, now, I don't have the figures for '35. My figures here only go back as far as '36.

Q. Could you ascertain the figures?

A. I really don't know right now. I don't know whether we have those figures or not.

Q. But you did have them for '36?

A. I have them for '36, yes.

Mr. Mellin: Where did you get those figures, Mr. Wineroth?

(Testimony of Joseph Norman Wineroth.)

The Witness: We got those from our books.

Q. (By Mr. Naylor): Do you have the books that would reflect the 1935 figures?

A. I asked our bookkeeping department to go back as far as they [159] could, and this is what they came back with. I wanted our total sales for as far back as we could go. In fact, I know now I asked them to go back as far as '34, because I knew we had started Wed Lok in '34—that is, advertising them. And I believe this is as far back as we have them, 1936.

Q. Now, yesterday you gave certain figures for the period from June 1946 to June of 1947. Now, what were those figures? What would they cover, Mr. Wineroth?

A. That would have covered all of our volume of business.

Q. The total volume of business?

A. That is correct, sir.

Q. And the figure you gave was $1,848,194.42?

A. That is correct, sir.

Q. That is correct according to the memoradum you hold? A. Yes.

Q. And what percentage of that total volume would have been Wed Lok rings, so marked?

A. Well, when we get back—I would say that 50 per cent of our sales have been in Wed Lok rings in our total volume since 1947. I wouldn't say as to '46, however. I don't recall. But when we got back in production after the war, that is.

(Testimony of Joseph Norman Wineroth.)

Q. May I interrupt you? When did you get back into production?

A. Oh, in '46 or '47. I don't know just when.

Q. You don't know when?

A. I can find these things out for you. I mean, if there is [160] any question——

Q. Isn't it a fact that the announcement of the resumption was made in May of 1947?

A. I believe it was, yes.

Q. Isn't there an ad that so states?

A. I believe so.

Q. Isn't it the fact that some of your customers who testified by way of deposition supplemented the ad which was introduced in the San Francisco depositions, to show May 1947, as the resumption date?

A. Well, we were making the rings prior to that, but that is when our advertising campaign came out.

Q. But were you selling them?

A. Sure we were selling them.

Q. Prior to May, 1947?

A. I think so, Wed Loks. We have never stopped selling Wed Loks.

Q. I realize you have so testified, but I am speaking of the resumption after the war. I am trying to get at when was the resumption after the war.

Mr. Mellin: Well, if they never stopped, how could they resume?

(Testimony of Joseph Norman Wineroth.)

The Witness: Well, we never stopped.

Q. (By Mr. Naylor): Resumption of your so-called full-scale production; that is a very simple question. [161] A. Yes, it is.

Q. Now, when was it?

A. I don't know the particular month or day. But when the war was over, why, the men came back and we went into a fuller production. We sent salesmen out. We sent salesmen out as soon as it was advisable to do so. That has nothing to do with our advertising. I mean, we may have sold—we could sell goods without advertising, as far as that goes. [161-A]

Q. Are you saying that advertising doesn't mean anything?

A. No, I don't, I didn't mean it that way. I meant that you can sell merchandise without the advertising.

Q. Will you take a look at defendant's exhibit 22 on the San Francisco depositions and read the caption of that ad in the record?

A. "Announcing Wed Lok ensembles"?

Q. Yes. What else does it say in the caption, if anything? Now will you read the date? I think you will find it expressed at the extreme top.

A. I am sorry, but I can't read it.

Q. Maybe I can help you.

A. I wish you would.

Q. Isn't it May 18, 1947?

A. I don't have my glasses, I am sorry. I use

(Testimony of Joseph Norman Wineroth.)

reading glasses. All right, I will take your word for it.

Q. Thank you. Would it not be the practice in the jewelry trade to publish an ad of that description, referring to Plaintiff's Exhibit 22 on the San Francisco depositions, "Incidentally with the introduction of the article referred to in the ad"?

A. No, not necessarily, Mr. Naylor. Sometimes you may have an article selling it for two years before coming out on a campaign on it. That doesn't mean anything.

Q. Would it be called an announcement?

A. Yes, sir. [162]

Q. ——Under those circumstances?

A. Oh, absolutely.

Q. It is a fact, is it not, Mr. Wineroth, that the period June 1946 to June 1947 ended within two weeks after the announcement contained in the ad I have just showed you, namely Plaintiff's Exhibit 22 on the San Francisco depositions?

A. That is correct.

Q. Are we to understand that the 50 per cent figure that you gave for that period, June 1946 to June 1947, was made in the last two weeks' period of that period pertaining to Wed Lok?

A. I don't know why you put it that way. Why should you say it was made in the last two weeks' period?

Q. Well, we have the announcement, have we not?

(Testimony of Joseph Norman Wisecroft.)

A. I told you we were selling the rings. I didn't tell you we held the selling of the rings back by waiting the announcement. The manufacturer can do this. Mr. Naylor, you can go out and sell a million dollars' worth of merchandise before you put an ad in.

Q. What would be a normal practice under those circumstances?

A. The normal practice is just that, sir. I mean a man is in business, he has to sell merchandise, and he may go out and sell a considerable amount before he does any advertising on it at all.

Q. Did you supply mats like the ad in plaintiff's 22 on the San Francisco deposition—— [163]

A. I would like to see it.

Q. Just a moment, sir—on the San Francisco deposition to any of your retail customers?

A. Did we supply mats like this?

Q. Yes.

A. We didn't supply mats, we supplied what we call a glossy proof.

Q. And the purpose of the glossy proof would be so they in turn could have a mat prepared from it, wouldn't it? A. Yes.

The Court: I understood you yesterday to say that the 50 per cent figure applied both to the year June 1946 to June 1947 and the year June 1947 to June 1948, and did I correctly understand you a few minutes ago to say that figure of 50 per cent does not pertain to the year 1946 to 1947?

(Testimony of Joseph Norman Wineroth.)

A. No, I didn't say that, your Honor; I said it did pertain to it—if I understand your question.

Q. A few minutes ago I thought you said that figure didn't apply to the first year.

A. It does apply. In other words, Mr. Naylor was trying to point out we did that in two weeks. He seems to be of the opinion we stopped selling Wed Lok entirely. The thing he doesn't understand, which I am trying to make clear to him, is that we sell complete diamond rings, and that is why the figures—that is why 50 per cent——[164]

Q. Now I am to understand that the 50 per cent figure applies to your gross sales for that year, June 1946 to June 1947? A. That is correct.

Q. All right.

Q. (By Mr. Naylor): That 50 per cent represents Wed Loks? A. That is correct.

Mr. Naylor: I have just one or two more questions. I would like to take just a minute, if your Honor will bear with me. I think that is all, your Honor.

Mr. Mellin: If your Honor please, I have just been handed all of the serial numbers or whatever they are called, of all of the Wed Lok rings used by Granat, which I would like to hand to counsel (handing document to Mr. Naylor).

Mr. Naylor: Thank you, sir.

Q. I think you are familiar with this or have you seen it?

A. I asked to have it made up, Mr. Naylor.

(Testimony of Joseph Norman Wineroth.)

Q. That is a list that is currently made up, is it not? A. Just made up, yes.

Q. That isn't the list that was actually referred to in the business of Granat Manufacturing Co. for the period that we spoke of yesterday?

A. I don't understand your question. You asked me yesterday to produce a list of all the Wed Lok numbers. That is the list I asked for.

Q. I think it was also qualified as to the list that was extant [165] at the time we were talking about, wasn't it?

Mr. Naylor: I don't think it is of any importance. We will let it go.

Redirect Examination

By Mr. Mellin:

Q. Now with respect to the list—just a minute—— A. Oh, pardon me.

Q. With respect to the list that you have in your hand, does that correctly, as far as you know, give the serial numbers or the numbers that we were talking about yesterday for Wed Lok rings throughout the entire period 1934 to date?

A. Well, as near as I can——

Q. Do you recognize any——

A. I recognize them all—I won't say all, but I recognize most of them. These are design numbers of Wed Lok rings that we have made.

Q. And once the number is given to a ring of a particular design, does it ever change for that design?

(Testimony of Joseph Norman Wineroth.)

A. No, it is never changed for that design.

Q. Now, the numbers on the list, do they correspond with the numbers we checked off on these invoices?

A. I haven't checked them, but I feel confident——

Q. I will let you have it, and tell me whether the numbers checked off here as Wed Lok conform to the serial numbers on the list you have. [166]

Mr. Groner: May it please your Honor, I dislike to interpose objections to questions of this sort, but obviously this list made yesterday could be made to conform and it isn't probative of the fact that the numbers in the earlier period are actually numbers of Wed Loks. A. Mr. Groner——

Mr. Mellin: Just a moment, he is addressing the court.

The Court: Overruled.

The Witness: I mean if there is any question——

Q. (By Mr. Mellin): Just confine yourself to the answer. A. What was the answer?

Q. Would you tell me whether the serial numbers or design numbers, whatever you call them, in these invoices, and which you said yesterday were Wed Lok rings sold during the years 1944, 1945, 1946 and 1947, correspond with the design numbers shown by the list to be adopted for Wed Lok rings.

A. They do.

Q. You know that?

(Testimony of Joseph Norman Wineroth.)

A. I know it. There is no question about it.

Q. You checked them last night, as a matter of fact? A. Yes, sir.

Mr. Groner: May I offer that in evidence, your Honor, as Plaintiff's exhibit next in order?

(List of Wed Lok numbers referred to was thereupon received in evidence and marked Plaintiff's Exhibit VV.) [167]

Q. (By Mr. Mellin): Now what happens when —what has preceded, if anything, the receipt of an invoice such as I have in my hand that is the question in controversy—that is a bill to Giaccobi for merchandise already received, is it?

A. Oh, yes, it accompanies the merchandise as it comes out of the factory.

Q. It accompanies the merchandise?

A. Yes, sir, accompanies the merchandise.

Q. Now during the war years, would you order any of that material and keep it in inventory for any period of time?

A. During the war years?

Q. Yes.

A. We tried to keep an inventory but there was no such—you couldn't keep an inventory of rings.

Q. So would it be reasonable to assume, then, that any merchandise received from Granat Bros. would be sold, say, within a period of 30 days and delivered? A. It would be.

Q. I show you a photostatic copy of a tear

(Testimony of Joseph Norman Wineroth.)

sheet of San Francisco Examiner for April 25, 1943, a Wed Lok ad displaying rings. Will you tell us what rings those are, please? Identify them by Granat name and number, series name and number.

A. This is Wed Lok Nanette series.

Q. Does that correspond or not in number with any of the serial numbers which appear in these invoices which we have been discussing? [168]

A. You will find these rings will be listed in that.

Q. And do you recall the number offhand? To refresh your recollection—— A. Yes, I can.

Q. ——I will hand you the invoices.

A. This would be 8148, line 4.

Q. What does the 4 indicate?

A. That would indicate the amount of small diamonds decorating——

Q. That would be 4 small diamonds?

A. 4 small diamonds.

Q. If there is a "2" behind it?

A. It would be a line 2.

Q. So the first four numbers indicate the design number?

A. The design number, that is right, and the wedding ring number—do you want the wedding ring number?

Q. Yes, if you would. In other words, there are two series of numbers for a set, isn't that so?

A. I believe it is 404795 would be the wedding ring number.

(Testimony of Joseph Norman Wineroth.)

Q. And the 5 would indicate 5 diamonds?

A. 5 diamonds in the wedding ring.

Q. Does that number also indicate by a change in the number whether it is gold, platinum or——

A. The last, the mounting ends with a 2 and the wedding ring ends with a 7 in gold, and when we make it platinum we end the [169] number with a 1, showing it is a platinum mounting, and 2 would show it is a platinum ring.

Q. By the way, in these exhibits A to E, is there a ring there that corresponds to the ring in this ad of April 25, 1943?

A. I am pretty sure there is a Nanette set there.

Q. I am sorry, I don't know which one (handing exhibits to witness).

A. Here is your Nanette set.

Q. And that is Exhibit what, Mr. Wineroth?

A. Wait a minute now—this is the 2 mounting. This is the same pattern that appears on that ad, the same Nanette ring but this is 2 mounted Nanette.

Q. That means 2 diamonds, one in each side instead of two at each side?

A. That is exactly the same ring, shank and all, and the same series, but it has only 2 mounting.

Q. That is the same number except with a "2"?

A. No, in this—this is 8038. This has the 2 mounting in it. I can give you that ring, though, if you want to see it.

(Testimony of Joseph Norman Wineroth.)

Mr. Mellin: May I offer that ad that I produced in evidence, your Honor, as explanatory to the witness' testimony as next in order?

(Advertisement in Examiner April 25, 1943, was thereupon received in evidence and marked Plaintiff's Exhibit WW.)

Mr. Groner: Do you know if this is already in evidence? [170]

Mr. Mellin: I would like to have it separate because there is a big bundle——

Mr. Groner: All right, if you let the record show that.

Mr. Mellin: Let the record show it is a part of another exhibit.

Q. Now have you seen any Feature Lock ads of customers of Feature Lock? A. Oh, yes.

Q. Will you state whether or not any of those ads give the name of the manufacturer on them that you have noticed, by customers?

A. I don't think they do. I have never seen any.

Q. And by the way, I asked you yesterday about advertising and I neglected to ask you whether or not the Granat Manufacturing Co. did anything on the radio advertisement of Wed Lok?

A. We didn't do any radio announcing ourselves, or buy any time, but we supplied this radio script.

Q. And who did you supply that to?

(Testimony of Joseph Norman Wineroth.)

A. We supplied those to our customers who requested them from our salesmen.

Q. When was that done?

A. Well, that—we did that in 1948—I believe 1947 and 1948 when it came out.

Q. I hand you what is labeled "12 fresh new radio announcements Wed Lok ensembles", and I note on there in handwriting there was a thousand sent to dealers. Would you tell us about that, [171] please? Were such scripts actually sent to dealers, and a thousand of them? A. Oh, absolutely.

Mr. Mellin: May I offer that in evidence as the next in order, your Honor?

(Radio announcements of Wed Lok ensembles referred to above was thereupon received in evidence and marked Plaintiff's Exhibit XX.)

Q. (By Mr. Mellin:) You say that was during the years 1947 and 1948?

A. 1948, yes. We have a new one now.

Q. Now with respect to the names counsel asked you about, "Wedded" and "Interlocked," did they indicate a brand name or a series name as you distinguished yesterday?

A. That was a series name.

Q. Both of them?

A. Wed Lok is our brand name and that is a series name.

Q. Now, Mr. Wineroth, you through your con-

(Testimony of Joseph Norman Wineroth.)

nection with the jewelry business, are you familiar with the difference—broadly the different methods of making rings? That is, the difference——

A. Oh, I am familiar with most of them, yes.

Q. By what process are the Granat rings manufactured?

A. Well, we make what is termed a tool made ring. In other words, it is a ring that is made out by tools up to the mounting, and then the balance is fashioned by hand? [172]

Q. When you say "made by tools" you mean in form like a forging?

A. That is, forged, trip hammers and presses; you get the parts, you get impressions from that, and then you trim it, a certain amount of trimming and a certain amount of hand piercing with swords and so forth, to fashion the ring.

Q. Is there another method known as a casting ring? A. That is right.

Q. And that process is something like, as I understand it, a dentist's casting for your teeth?

A. That is correct.

Q. Do you know what the general opinion in the jewelry trade is as to the relative qualities between a hand tooled ring and a cast ring?

A. Well, it is a generally accepted fact throughout the industry that a tool made ring is a far superior ring to a cast ring.

Q. In other words, it is finer merchandise, finer jewelry?

(Testimony of Joseph Norman Wineroth.)

A. There is no question about that at all.

Q. Now you were asked about customer orders during the war. Did you take any orders at all during the war and if you did or did not, will you explain it just as briefly as you can to us and the reasons?

A. Well, we discouraged the sending of any particular orders for particular merchandise. We suggested what we call an open order. In other words, give us some idea of how many rings you would like and what price line, and let us send them to you, because if you order a certain ring and we don't have it, it is going to hold up your order. We had this limited production. It was agreeable to all our accounts, they cooperated, and we asked them to take just what we produced. That is why we discouraged the orders for particular merchandise. However, in certain instances if a customer wrote us and told us they had to have a particular design of wedding ring to match a mounting, we would do all we could. In fact, we did turn them out, but we didn't encourage any particular design orders. We wanted open orders.

Mr. Mellin: That is all.

Recross Examination

By Mr. Naylor:

Q. On your redirect you testified that the names "Wedded" and "Interlocking" were merely series names? A. Yes.

Q. As distinguished from trademarks?

(Testimony of Joseph Norman Wineroth.)

A. Yes.

Q. I would like to show you an advertisement which was offered on the San Francisco deposition at 34, and I will ask you to read the caption on that particular advertisement.

Mr. Mellin: What is the date, Mr. Naylor?

Mr. Groner: January 11, 1946.

A. This says, "Wedded rings." I don't see the date. Where is it?

Q. (By Mr. Naylor): What appears directly under the word [174] "Wedded"?

A. "Trademark", I believe it says.

Q. Now does the word "Wed Lok" appear in that advertisement? A. No.

Q. Now will you examine 35, the very next page in that binder, and read the caption on that ad?

A. "Another new series of interlocking ensembles in platinum".

Q. What word appears in immediate juxtaposition to the word "interlocking"?

A. "Ensembles in platinum".

Q. What is the word in small type directly under the word "interlocking"?

A. It says, "trademark".

Q. Does the word "Wed Lok" appear in that advertisement? A. No, it doesn't.

Q. And what is the date of that ad?

A. March 1, 1936.

Mr. Naylor: That is all.

(Testimony of Joseph Norman Wineroth.)

Further Redirect Examination

By Mr. Mellin:

Q. Those marks that you just mentioned—those were retail ads, by the way?

A. They are retail ads.

Q. Those were the ads that were put in by deleting "Wed Lok" during the interim of purchasing the Wed Lok registration from Strauss? [175]

A. Well, I am not positive of that, but I imagine so, Mr. Mellin.

Mr. Mellin: That is all.

Mr. Naylor: That is all.

* * *

FORREST RALPH QUICK

called on behalf of the plaintiff, sworn.

Direct Examination

* * *

Q. What is your name, age and address, Mr. Quick?

A. Forrest Ralph Quick, age 52, 2390 Van Ness Ave., San Francisco.

Q. And what is your occupation?

A. Controller, Granat Bros.

Q. And that is the plaintiff here?

A. Yes, sir.

Q. How long have you been controller for Granat Bros.? [178] A. Since October 1945.

Q. And are all of the records of Granat Bros., including their books, under your control?

A. Yes, sir.

(Testimony of Forrest Ralph Quick.)

Q. And in what condition were those books when you arrived there, or the records?

A. Well, they were not all there. They had been thrown away over a period of years. So that I could find some, and others I can't.

Q. Some in storage and some disposed of?

A. That's right.

Q. Did they have any methodical way of keeping books? A. No, sir.

Q. Other than income and outgo?

A. That's right.

Q. You are familiar, are you, with the transactions and the method of transacting business between Granat Bros. and the Granat Manufacturing Co., used synonymously with the L. A. Giaccobi Co.? A. That's right.

Q. I hand you a series of invoices and call your attention to the fact that they are made on the letterhead of billhead which says, "Granat Manufacturing Co.", and I ask you if you are familiar with those invoices.

* * *

Q. (By Mr. Mellin): How does it happen, Mr. Quick, if you know, will you tell us the reasons why those heads say, give the address of the factory of Granat Bros. in typing and then say "Granat Manufacturing Co."? Will you tell us, please, briefly.

A. Yes, the practice is to divide our retail from wholesale business, so there will be no chance of making mistakes in allocation of invoices.

Q. In other words, you would reach that effect

(Testimony of Forrest Ralph Quick.)

if you had read colored for one and white for the other? A. That is correct.

Q. Now are they actually entered in the books of the Granat Bros. as entries on Granat Bros.?

A. Certainly.

Q. I mean, that was only a method of distinguishing, the colors?

A. That's right, just for accounts receivable and to Granat Bros., and the other to L. A. Giaccobi and Sons. [180]

Q. I see.

Mr. Mellin: I offer this bundle in evidence, your Honor, to explain the testimony of Mr. Wineroth and this witness.

The Clerk: Plaintiff's CCC.

* * *

(Invoices referred to above were thereupon received in evidence and marked Plaintiff's Exhibit CCC.)

Q. (By Mr. Mellin): I asked you yesterday afternoon to produce actual records—and by the way, all the records of Granat Bros. are under your control, including the stock control cards and sales cards? A. That is correct.

Q. And from that, this morning, in response to that, you handed me quite a volume of what I think you called "inventory cards"?

A. That is correct.

Q. Now will you tell us, please, what these cards are, and what the material on them shows?

(Handing to witness.)

(Testimony of Forrest Ralph Quick.)

A. Well, these cards we use for the control of our inventory [181] by starting out with the order plates in our factory, which gives you the date order, the date the job was completed——

* * *

A. (Continuing): ——this shows here on design No. 1157W7——

Q. (By Mr. Mellin): By the way, Mr. Quick, so that we will have no question here, are all these cards you produced in connection with Wed Lok rings, and the cards for them, are they so designated? A. Yes, sir.

Q. And these were taken from the actual records?

A. Yes, sir. I will get one here that goes a little further along. This is a Wed Lok curved Wed Lok ring.

Q. Does it give the design number?

A. Yes, sir, 2887-7YW. It is a ladies' wedding ring. We produced it in 1941 to 1943, the rings were sold.

Q. Are actual production figures shown for those three years on that card? A. Yes.

Q. And do you have actual sales noted on the card? And how do they get there?

A. Yes, sir. They are posted there from the sales tags. We check—— [182]

Q. These are all retail transactions that you are speaking of now? A. Yes, sir, by stores.

Q. Go ahead.

(Testimony of Forrest Ralph Quick.)

A. You have in the Mission store, sold a set of these rings in June of '42, July of '42, June of '45, September of '42. The Geary sold one in May of '43; Oakland sold in '42, '41, '42, '43, this one design.

Mr. Mellin: Now these cards, the whole bundle of cards——

Q. Is that whole bundle complete?

A. No, that is not complete. This is all I could find in the warehouse.

Q. I see. So this is at least a portion of them. And what period of years do this group of cards cover?

A. This covers from the period of 1941 to 1946. And even '47 and '48 on some of them.

Q. I see. And they are all Wed Lok cards?

A. Yes.

Q. And they also show sales of Wed Lok rings, during that period? A. Yes.

Q. And they all show manufacture of those during that period? A. Yes.

Q. And all through the period, without any hiatuses, as counsel called it? A. That is right.

Mr. Mellin: I will offer those in evidence as Plaintiff's next in order.

Q. By the way, Mr. Quick, could you go through there and find me a ring, a Wed Lok ring, which has a design number 3957? They have photographs on them, too, those cards, do they not, Mr. Quick?

A. Some of them do, and some of them have

(Testimony of Forrest Ralph Quick.)

been taken off and transferred to other cards. 3957? I have it.

Q. And does that say "Wed Lok" on it, or not?

A. That says "Wed Lok, No. 35574 YW, diamond ring Wed Lok". [184]

Q. Do you show sales of that, and what year do you happen to have a card for?

A. This shows sales for 1944, 1943, '42, '42, three and four.

Q. Thank you.

I will offer the group of cards produced by the witness as plaintiff's exhibit next in order.

The Clerk: Pardon me. How many are there?

Mr. Groner: Mr. Clerk, what will that number be?

The Clerk: If it is all one exhibit, it will be DDD.

(The cards referred to were received in evidence and marked Plaintiff's Exhibit DDD.)

Q. (By Mr. Mellin): Now, from your books and records—just strike that.

Mr. Quick, will you state whether or not the Granat Bros. have an advertising department, as such? A. Yes, they have.

Q. And do you know of your own knowledge and from your records approximately what that cost Granat Bros., say, per month during the years 1946, '47 and part of '48?

A. The total cost, you mean?

Q. No, I don't mean that. I mean, what does it

(Testimony of Forrest Ralph Quick.)

cost? Is there an average cost per month of your advertising department?

A. Yes. Well, you want to include just salaries, or do you want to include the advertising production, promotion production, and all that? [185]

Q. No, I just wanted—I want what I suppose you would call in your business just the overhead, the salaries and rent, or whatever you do. What about the salaries?

A. The salaries would be around $2800 to $3000 a month.

Q. And the overhead exclusive of production, would that be in addition?

A. About another thousand dollars.

Q. Thank you. Now, from your books and records can you tell us the amount of money that was spent by Granat Bros. for national advertising of Wed Lok from May 1, 1947, to December 31, 1947?

A. Yes. It is $33,659.96.

Q. I see. Now——

Mr. Naylor: Whose advertising is this, counsel?

Mr. Mellin: The Granat Bros., national advertising of the Wed Lok from May 1, 1947, to December 31, 1947.

Q. Now, that date of May 1 was selected, as I understand it, because that is when you started or restarted or recommenced national advertising of Wed Lok after the war, is that correct?

A. That's right.

Q. Now, you handed me a list which was so

(Testimony of Forrest Ralph Quick.)

labeled, and you have one item, "Vogue, Wed Lok ads, $9,280"? A. That is right.

Q. Trade publication Wed Lok ads, $830?

A. Correct. [186]

Q. $4,110, Wed Lok mats and mat folder for dealers, $2,430.11? A. Correct.

Q. Wed Lok folders, $6,506.78?

A. That is correct.

Q. Wed Lok display boxes, $2,266.96?

A. Correct.

Q. Advertising production and miscellaneous pertaining to advertising, $13,346.11. Now, what is that last item?

A. That last item covers all of the plates, any outside art work done during that period of time, and, oh, incidentals such as paper, overhead, exclusive of salaries.

Q. Exclusive of salaries? A. Yes.

Q. Is that exclusive of this two or three thousand dollars a month, running the advertising department? A. That is correct.

Q. And so this doesn't, the list and the figures you gave, include the flat cost of the advertising department? A. No, sir.

Q. And this sheet that I have a copy of makes this note, is that correct? A. Yes, sir.

Q. And that is a correct notation? A. Yes.

Mr. Mellin: May I offer that in evidence, your Honor, as [187] by years, starting with the year 1934?

(Testimony of Forrest Ralph Quick.)

A. $4,650.48. 1935 was $2,803.40. This is for space only.

Q. Yes.

A. 1936, $5,640.20. 1937, $1,229.90. 1938, $3,754.50. 1939, $1,341.20. 1940, $2,112.30. 1941, $994.70. 1942, I have since discovered, is in error. I think there were three advertisements that ran. I gave you copies of the advertisements.

Q. So this doesn't reflect that?

A. That's right.

Q. That is all right. Leave those out.

A. $77.

Q. And then?

A. 1943, $1,264.80. 1944, '5 and '6——

Q. You found no ads?

A. No ads. 1947, $19,296.62. And 1948, for the period from January 1 to July 31, 1948, $6,652.15.

Q. Now, will you tell us, that last figure, as I understand it, you only had the total figure for the year which was double this $6000 figure?

A. That is correct.

Q. And you arrived at the $6000 in what fashion?

A. For seven months, we calculated 5 per cent of the advertisement.

Q. And you would be certain that that would be at least the minimum? [189]

A. Well within it, yes, that is correct.

Q. Now, in the next column you gave me, you

(Testimony of Forrest Ralph Quick.)

gave me the estimated cost of production. Now, will you explain what that was?

A. Well, we find over a period of years, from our experience, that 20 per cent of the cost of this space is the cost of production.

Q. And what is the cost of production? What is production? That is what I don't understand.

A. Well, that would be the plates that you have to have made, and then any outside art work, and also any typesetting.

Q. I see. Now, would you give us those—what was that total figure? What is it?

A. That totaled $10,008.65.

Q. And then on the right you have a total cost of $60,055.96 for that period?

A. That is correct.

Q. And then that list is accurate, and you have arrived at the 1948 figures by taking 50 per cent of the actual expenditure for the whole year?

A. That is correct.

Q. And allocated that to seven months?

A. That's right.

Q. And would you say that would be at least the minimum that would have been spent during those seven months?

A. That would be right. [190]

Q. And that list that I hand you, that is the list you gave me, which you have just been testifying from? A. That is correct.

(Testimony of Forrest Ralph Quick.)

Mr. Mellin: I will offer that in evidence as Plaintiff's next in order.

The Clerk: FFF.

(Schedule of advertisement cost figures was received in evidence and marked Plaintiff's Exhibit FFF.)

Mr. Mellin: That is all.

Mr. Groner: No cross-examination, your Honor.

The Court: That is all.

Mr. Mellin: I will call Mr. Peterson, the president of the defendant.

HENRY PETERSON

called in behalf of the plaintiff; sworn.

* * *

Direct Examination

By Mr. Mellin:

Q. Will you give your name, age and residence, Mr. Peterson.

A. Henry Peterson, forty, 4293 Bedford Avenue, Brooklyn, New York. [191]

Q. And you are the president of the Feature Ring Company, the intervening defendant here?

A. That is correct.

Q. Now, what is your business, Mr. Peterson?

A. Manufacturing of diamond bridal sets.

Q. That is in gold and platinum?

A. Gold and platinum.

(Testimony of Henry Peterson.)

Q. And how long have you been in the business of manufacturing bridal sets?

A. About fifteen years.

Q. About fifteen years? A. Yes.

Q. That would bring it back to about 1934 or '35? A. Approximately.

Q. And that business has always been located in New York? A. That is correct.

Q. Or in that vicinity?

A. That's right, sir.

Q. And your principal business was the manufacture of wedding and engagement rings, isn't that so? A. That's right, sir.

Q. And as a matter of fact, you keep very close tabs on your business, don't you, your own individual business? You run it, don't you?

A. That is correct. [192]

Q. I mean, you watch the sales and manufacture and all the details? A. That is correct.

Q. And you have been in business during that period continuously, isn't that a fact?

A. That's right.

Q. Now, you have been known as the "Feature Ring Company" for about, approximately that same length of time, isn't that so?

A. Yes, sir.

Q. And you are not a corporation?

A. We are now a corporation.

Q. You are now. And you are the principal stockholder, or do you own all the stock?

(Testimony of Henry Peterson.)

A. All the stock.

Q. Now, we have been discussing here that you market a bridal set in which the rings latch or lock together; that has been explained here. That is correct, isn't it? A. Yes, sir.

Q. When did you start in that business, making that particular set?

Mr. Groner: Making or marketing?

Mr. Mellin: What?

Mr. Groner: Making or marketing?

Q. (By Mr. Mellin): Marketing.

A. First part of '48. [193]

Q. May of—— A. That's right.

Q. That would be a fair statement, wouldn't it? A. Yes, sir.

Q. May of 1948? A. That's right, sir.

Q. Before that time you had made just plain bridal sets? I mean, that is, marketed?

A. Yes, sir, that is correct.

Q. Now, at that time is it true or not that you adopted for the trade name of your company "Feature Lock"?

A. I adopted the trade name "Feature Lock."

Q. And had you ever heard of the Granat Bros. at that time, the plaintiff here?

A. I had, yes.

Q. And you knew them by their reputation rather well, did you? A. Vaguely.

Q. Vaguely?

A. I knew they had a good reputation.

(Testimony of Henry Peterson.)

Q. Pardon?

A. They had a good reputation.

Q. I see. And had you heard at that time of the trade-mark, their trade-mark "Wed Lok"?

A. I did.

Q. For how long had you known of it? [194]

A. For about six to eight months prior to my use of the "Feature Lock."

Q. Now, your deposition was taken in this action by your counsel in New York, was it not?

Mr. Groner: It was plaintiff's deposition.

Mr. Mellin: Well, I think you took it out of my hands, Mr. Groner, and I think you took the deposition rather than me.

Mr. Groner: Well, it was simply your choice.

Mr. Mellin: You helped me, or, rather, I helped you.

Q. I read to you from page 14:

"Q. At the time you commenced manufacturing 'Feature Lock' did you know of Granat Bros. or Granat Manufacturing Company?

A. Yes, I did.

Q. At the time you commenced marketing your product under the name 'Feature Lock', had you any knowledge of Granat Bros.' registration or use of the word 'Wed Lok'? A. I did.

Q. How long had you known of that?

A. A few months before, and only spasmodically, and didn't pay very much attention to it.

Q. Did you know enough about it to know

(Testimony of Henry Peterson.)

whether the word 'Wed Lok' had any value or connoted in the general public mind any particular product from a particular [195] source?

A. I did not think that it bore any value to anyone in the public mind or in the industry to any great extent."

You so testified? A. I did, sir.

Q. And that answer—if those questions were asked you today, those would still be your answers? A. Exactly the same, sir.

Q. Now, you have been sitting in the courtroom during the taking of the testimony, haven't you?

A. Yes, sir.

Q. And you have heard of the widespreadness of the customers of Wed Lok rings? You have heard the testimony here?

A. Yes, I have heard the testimony.

Q. And you have noticed the dealers' ads throughout the country as they came into evidence, too, didn't you? I mean, generally?

A. Rather sparingly.

Q. And the widespread sale over the—geographically—of Wed Lok, isn't that so?

A. Sparingly, very sparingly.

Q. And you only noticed—you thought you just noticed it sparingly? A. Well,——

Q. Now, you also heard that there was that national advertising [196] in the Jewelers' Circular, isn't that true? Didn't you, in 1947?

A. I believe so, yes, sir.

(Testimony of Henry Peterson.)

Q. And how about the ads that came into evidence in Vogue during the year '47? You heard that in the testimony, didn't you?

A. I heard it during the testimony, but I never saw them.

Q. And you never saw the ad, of course, in the Jewelers' Circular—that is a trade journal?

A. I might have seen them in the trade journal, yes, sir.

Q. But it is your testimony you had never heard of "Wed Lok" until a few months before May of 1948; is that your testimony?

A. About six to eight months before.

Q. Now, how did it happen? Now, you noted that Wed Lok ad, those Wed Lok ads, as they are used, and everybody had used them for many years; you had noticed that they were written in a script; you noticed that?

A. I did, when I saw the ads.

Q. And how did it happen that your Feature Lock ad came out in a similar script? What was that? Purely coincidence?

A. I don't believe it to be anywhere near the same kind of writing in "Wed Lok." In fact, I went out of my way to make sure it didn't resemble "Wed Lok" in any way whatsoever.

Q. Oh, in other words, you were conscious of "Wed Lok" at the time you adopted that "Feature Lock" name? A. I was conscious—— [197]

Mr. Groner: The witness has so testified.

(Testimony of Henry Peterson.)

A. ——I was conscious of the fact "Wed Lok" was in existence, and I went out of my way to make sure there was, or would be, no infringement or any likeness or similarity between the two names whatsoever.

Q. (By Mr. Mellin): I see. And you felt that the appropriation of the word "Lock" was very clearly——

Mr. Groner: May it please your Honor, I object to counsel's characterization.

The Court: Well, he used the word laughingly. Change the question.

Mr. Mellin: I will change the use of the word.

Mr. Groner: I don't think he can take a word out of the language and monopolize it.

Mr. Mellin: You should have remembered those things when you were cross-examining Mr. Granat, and you wouldn't complain so badly.

Mr. Groner: I still do.

The Witness: Mr. Mellin, all I did was to use the word "Lock" to describe my product, as a locking system.

Q. (By Mr. Mellin): You didn't think it was sufficient to describe it in the body of the ads, isn't that so?

A. In conjunction with that. It is actually a feature product with a locking device, and there was no other way I could possibly describe it efficiently, and I took a word out of the [198] English language and I used that word.

(Testimony of Henry Peterson.)

Q. You thought you had a perfect legal right to do that? A. That's right.

Q. Now, as a matter of fact, despite this testimony I have been reading, didn't you know of the tremendous popularity of "Wed Lok" during the years from '34 to '48?

A. It was not tremendously popular at all.

Q. You didn't know of it at all, did you?

A. I never heard of it.

Q. Didn't you make the territory?

A. I had my salesmen make it. I made the territory at times myself. I never heard of it.

Q. What territory did you make?

A. Midwest.

Q. And the East?

A. And sometimes the East.

Q. Did you call on any of the large number of dealers, the jewelers——

A. I had many of them come into my office from all over the country.

Q. And not one of them ever mentioned Wed Lok?

A. Not one of them ever mentioned Wed Lok, and a good many of the men who are the same people you mentioned here never mentioned "Wed Lok" to me.

Q. You never heard of it? [199]

A. No, I never did.

Q. Up until three months before 1948?

A. Around six to eight months, approximately.

(Testimony of Henry Peterson.)

Q. Now I read you from page 52, and the question is rather repeated, but I would like to have it in the record:

"Q. When did you first hear the word 'Lock' in conjunction with some other word, used in connection with bridal sets? I am not going to hold you to any date or month.

A. Well, it might have been a few months before I came out with my interlocking set, and I heard it probably casually and didn't pay any attention to it."

That is a correct statement? A. Yes, sir.

Q. Yet you, as you testified a moment ago, tried to have—to scrupulously and clearly distinguish between the two, isn't that so? Now, isn't there a conflict there?

A. I don't get what you mean, sir.

Q. Well, here you say that you heard of it casually and didn't pay any attention to it.

A. That's right.

Q. And a few moments ago you said that you paid particular attention to distinguishing from "Wed Lok"?

A. When I was about to use my own trademark, I knew that the [200] word, or that the name, "Wed Lok" was in existence.

Q. And you knew it meant Granat products, didn't you?

A. I knew that they were Granat products, yes, sir, I did. And I made a point to make sure that

(Testimony of Henry Peterson.)

whatever trade-mark I used for my product would in no way infringe, in any way whatsoever, or impair the product of any other manufacturer, regardless of what it was, whether it was Granat or anyone else. There is plenty of room in this country for everyone to conduct their business on a legitimate, legal basis, and consequently I used that word "Lock" because I thought I had a perfect right to use it, to describe my product.

Q. Would you say that your product would be less salable if you described it as "Feature Bridal Sets," and then put in the body of the ads that they were locking rings or interlocking rings?

A. I don't know whether they would be less salable or not. I simply used it to describe my product, and I didn't think of using any other name, for I thought I had a right to use the word "Lock."

Q. Then would you tell me this: Assuming that you considered that you had a right to use it, did you consider the fact that the use of the word "Lock" might bring business from the Granat representation and good will?

A. None whatsoever.

Q. And the same, that it might enhance your sale, using "Lock"? [201] A. Definitely not.

Q. Never entered your mind?

A. No, sir, it did not. We have a reputation of our own to consider, and we base it directly on our own representation and our reputation for

(Testimony of Henry Peterson.)

doing business, and I think it is just as good as Granat Bros.'.

Q. Now, I read you this testimony, your own, page 61 of your deposition:

"Q. Now, as far as your recollection is concerned, you had never seen advertisements of 'Wed Lok' or heard of 'Wed Lok' in connection with wedding ring ensembles until about three months before, let's say, April or May of 1948, is that correct? A. That is correct.

Q. And you have never seen any of the Granat Bros. or other ads advertising wedding ring ensembles prior to that time?

A. No, I did not even see it at that time. I just heard about it.

Q. And you were in the ring business, in the ring ensemble business, weren't you?

A. That's right.

Q. For over twelve years?

A. Approximately."

By the way, if those questions were asked you,—those [202] question were asked you, and those are the correct answers?

A. Whatever answers I gave you were correct.

Q. I see.

A. They were honest and correct.

Q. And you would so testify today if those same questions were asked you?

A. That is correct, sir, to the best of my knowledge.

(Testimony of Henry Peterson.)

Q. Now, on the same page, I read to you from that deposition:

"Q. In other words, you don't look at the advertisements of competing manufacturers?

A. Well, sometimes we do. We didn't pay too much attention to it.

Q. And you don't pay too much attention to the trade journals?

A. Occasionally, very, very seldom do I have patience to go through a trade journal."

That would be your testimony today, would it, if you were asked those questions?

A. That is correct.

Q. By the way, you use the—in the Feature Ring Company do they manufacture rings by the tool method or by the casting method?

A. Both.

Q. When did you start the tool method?

A. Several years ago. [203]

Q. And what about these Feature Lock rings?

A. Some are cast, some are a combination of both.

Q. I see. Now, as far as the Feature Lock rings are concerned, they are sold under various other—I mean, brand names, isn't that so?

A. Yes.

Q. I mean, I am not interested in what those names are. When they are sold by customers of yours, either under their own brand names or

(Testimony of Henry Peterson.)

under Feature Lock, the ads don't include the name "Feature Lock Ring Company," do they?

A. Not in the paper, newspaper advertising, no.

Q. Or in the publications advertising your product, other than the publications of the Feature Ring Company?

A. That's right; the "Feature Lock," that is advertised by the Feature Ring Company, and they have "Feature Ring Company" prominently displayed on every ad.

Q. That is, the Feature Ring Company ads?

A. That's right, sir.

Q. Now, I hand you a group of—I guess they are mat proofs or something? A. Yes, sir.

Q. Now, those represent the mats that you send to your customers, do they?

A. That is correct.

Q. For republication? [204]

A. That's right.

Q. And none of those include the name "Feature Ring Company", isn't that so?

A. No, sir.

Q. It is the place for the particular jeweler to put his name (indicating)?

A. That is correct.

Q. As a matter of fact, the Feature Ring Company isn't mentioned in any one of those, sir?

A. No; that's right. It is not supposed to be.

Q. But the trade-mark "Feature Lock" in script is on every one? A. That is correct.

(Testimony of Henry Peterson.)

Q. And referring to diamond ring ensembles?

A. That is right.

Mr. Mellin: May I offer those in evidence as plaintiff's next in order?

The Clerk: GGG.

(Mat proofs of Feature Ring Company were received in evidence and marked Plaintiff's Exhibit GGG.)

Q. (By Mr. Mellin): And you also provide a space in at least the one that I am showing you, the first one of GGG, for a brand name?

A. That's right, sir.

Mr. Mellin: That is all.

Mr. Groner: That is all. [205]

LEE GARNER

called on behalf of the plaintiff, sworn.

Direct Examination

By Mr. Mellin:

Q. Will you give your name and address, please?

A. Lee Garner, Canterbury Hotel, San Francisco, California.

Q. And where are you employed?

A. By the Advertising Checking Bureau.

Q. And where are they located in San Francisco?

A. At 16 First Street.

Q. What is their business?

(Testimony of Lee Garner.)

A. They read and check all the daily newspapers in the country for advertising.

Q. And they are employed in that by those interested?

A. That is right, anyone who wants the service.

Q. Now I will show you report of the Advertising Checking Bureau, Inc., what is labeled, "Special retail advertising cost report of Wed Lok rings in all daily and Sunday newspapers in all cities for the following months: July 1948." Compare it for Granat Bros. and ask you if you can identify that.

A. Yes, we made that up for them.

Q. Were you employed at that time for that particular report? A. Yes, I was.

Q. Now prior to that you were employed to assemble tear sheets [206] but not to make any reports, is that correct?

A. That is right. This is the first report we made. Prior to that we just gave them tear sheets of advertising.

Q. Just a moment, will you tell us—was that report made under your supervision or by you?

A. It was.

Q. And will you tell us how the figures and the things designated thereon were arrived at?

A. Yes, we collect the tear pages, we have an order for all—for instance, we cover in this order all Wed Lok rings. That means that every daily newspaper in the country is read and every ad that mentions Wed Lok rings is furnished—the pages

(Testimony of Lee Garner.)

are collected then for those ads and they are then measured—the advertising pertaining to Wed Lok is measured and then the cost of space is calculated at the national line rate for each of the individual newspapers.

Q. So that on this compilation that you have identified, on the first page there was for the month of July 1948, 219 advertisements, 55,611 lines, and the cost of space was $9,443?

A. That is right.

Q. On the subsequent—By the way, was this only for Wed Lok?

A. Yes, that is for Wed Lok.

Q. Only? A. Yes.

Q. And on the subsequent pages there is on the left a designation [207] of state and city, the store, which would be the advertiser?

A. That is right.

Q. The publication? A. That is right.

Q. Then the date, the trademark advertised, the number of lines in the advertisement and the cost of that advertisement? A. That is right.

Q. And this, you say, is actually made up in the fashion you testified to? A. That is correct.

Mr. Mellin: May I offer that in evidence, your Honor, as Plaintiff's next in order?

* * *

(Advertising Checking Bureau report referred to above was thereupon received in evidence and marked Plaintiff's HHH.)

(Testimony of Lee Garner.)

Q. (By Mr. Mellin): Now prior to July 1948, were you employed to assemble clippings of Wed Lok ads for Granat Bros.?

A. Yes, at that time we were checking all Wed Lok ads and furnishing them the newspaper pages showing all ads.

Q. You checked the number of tear sheets of ads of Wed Lok only? [208]

A. That is right.

Q. I hand you a card which shows "Advertising on Wed Lok rings Granat Bros."

Mr. Taylor: May we see that?

The Clerk: Very well. (Document was handed to counsel.)

Q. (By Mr. Mellin): I hand you a card and ask you if that is part of the records of your company?

A. Yes, it is. This is our billing record.

Q. And that was kept in the regular course of business? A. That is right.

Q. Now that shows the month of July there, does it not, 1948? A. That is right.

Q. And that compilation we just offered in evidence, which is Exhibit HHH, is the result of those clippings indicated on the tear sheets?

A. That is right.

Q. Now what are those other months, are they for the months——

A. October 1947 through July 1948.

Q. All right. And then I notice some figures in the column next to that—for example, October is

(Testimony of Lee Garner.)

134, November 255, December 1,433, January 1,348, and so on. What are those figures?

A. Those are the number of Wed Lok ads which were furnished to Granat Bros. month by month.

Q. Each month by month. And there is a cost column there on the right. What is that? [209]

A. That is the amount for which they were billed at 7 cents each.

Q. Yes. 7 cents per tear sheet?

A. That is right.

Mr. Mellin: I offer that in evidence as Plaintiff's next in order.

(Billing card referred to above was thereupon received in evidence and marked Plaintiff's Exhibit III.)

Mr. Mellin: That is all.

Mr. Groner: No cross-examination. [210]

Wednesday, March 16, 1949—2:00 o'Clock

Mr. Mellin: If your Honor please, we have the depositions of nine witnesses taken, one in Los Angeles, one in Salem, Oregon, one in Denver, one in Aurora, Illinois, one in Chicago, one in Buffalo. The depositions are typical, and with the court's permission I will make a brief statement that will cover all of them at once. Will that be satisfactory?

The Court: Yes.

Mr. Mellin: I will use the one of Mr. Jacoby at Portland, which is the first one I have before me,

as being typical of all of them. They are the same except for different numbers.

Mr. Jacoby testified he was a jeweler of Portland, Oregon; "that he has been in the jewelry business approximately 43 years and in the retail business in Portland for 39 years. That he has known of Granat Bros. for close to 30 years or longer, and knows that Granat Bros. makes the finest quality wedding rings and diamond rings obtainable. That he is familiar with the trade-mark Wed-Lok and stated that the Wed-Lok ring ensemble was manufactured by Granat Bros. and has known of the ring ensemble sold under the trade-mark Wed-Lok for a period of 10 years or longer. That when he hears the word "lok" or "lock" used in connection with wedding ring or engagement ring ensembles, he thinks of Granat Bros.

"That Granat Bros. has such an excellent reputation in the [211] Portland area that every jeweler in the city attempts to get their line. That he sells Wed-Lok ring ensembles and advertises wedding ring ensembles extensively in the Portland newspapers. He produced books of his newspaper advertisements from 1947 to the date of the deposition. The book was kept in the regular course of business and showed all of the Wed-Lok advertisements that were placed in the Portland papers during that period, that the advertisements were introduced into evidence as Plaintiff's Exhibits 1 to 37, inclusive. That he advertised in both the Portland Journal and the Oregonian. He also produced his diamond ring register which showed continuous purchase of

Wed-Lok rings from May 10, 1937 to October 11, 1941. He stated at least one-third of the wedding ring-engagement ring ensembles he sells are Wed-Lok rings. He also testified that there was at present a display of Wed-Lok rings in the window at the front of his store.

"That he has known of the sale of wedding ring-engagement ring ensembles sold under the trade-mark Feature-Lock for approximately one year, and saw it first in a newspaper advertisement of a competitor and thought that Granat Bros. was selling their rings in Portland through another dealer, he having previously had an understanding with Granat Bros. that only he and one other dealer would sell the Granat line. That when he first saw Feature-Lock, he thought that it applied to a Granat product. That he has customers enter his store and ask for ring ensembles, [212] calling for them by the trade-mark Wed-Lok, and that this occurs frequently. That Feature-Lock mountings were offered him through Mayer Bros. of Seattle, and he has seen the Feature-Ring ensembles. That the quality of the Feature-Lock ensembles does not compare to the Granat rings, the latter being far superior.

"Cross-Examination

"That Exhibit 4, one of his advertisements, states, "Wedding and engagement rings that lock as one", and that these rings have a mechanical means that snap together.

"That his ads do not use the word "Granat".

However, they tell customers who come in to look at the rings that they are manufactured by Granat Bros. That some of his ads state that the two rings lock together. That prior to the war Jacoby purchased from Granat Bros. Wed-Lok rings that dovetailed. That he receives mats from Granat Bros. and then cuts them up and re-arranges them, changing the copy if it does not suit him. That during the war he did not know whether Granat Bros. was making Wed-Lok rings or not. That he was not able to secure them. That he used to go to San Francisco and buy what he could from Granat Bros. as they were not accepting orders and at times Granat Bros. would send to him what they had. That this same condition applied to other merchandise he sold.

"That the records he had on hand show the last purchase of Wed-Lok rings in 1941. However, this stock was not immediately sold and the stock record book does not show when the rings [213] were sold. His records would show that at least one set of Wed-Lok rings was sold September 11, 1942. That he said the ad of Dan Marx & Co., 511 Southwest Broadway, Portland, Oregon in the Sunday Oregonian advertising Feature-Lock wedding ring ensembles.

"Redirect Examination

"That he purchases the quantity of Granat Bros. products because he shopped in the East and West and all over, and found that Granat has the finest line that he can buy, and that their business is built on fine quality merchandise."

I offer in evidence the depositions in this action of Moritz Jacoby, Holly G. Jackson, Leonard B. Goldblatt, Floyd Kleiger, Arther A. Navarro, Charles Van Sipma, Norman Kernis, Harry Gamler, and the exhibits attached thereto. Those are on file with the clerk.

Mr. Groner: No objection, your Honor.

The Clerk: You say there are nine altogether?

Mr. Mellin: One more; I have the deposition of Shapiro.

Mr. Groner: I understand, may it please your Honor, that at some time convenient in the future if we care to supplement my brother's statement, that is in order?

The Court: Oh, yes, certainly, I expect you to do that.

Mr. Mellin: And that of Benjamin B. Shapiro.

* * *

(The depositions introduced on page 214 were received in evidence and marked as follows: Plaintiff's Exhibit JJJ, Moritz Jacoby; Plaintiff's Exhibit KKK, Holly G. Jackson; Plaintiff's Exhibit LLL, Leonard B. Goldblatt; Plaintiff's Exhibit MMM, Philip Kleiger; Plaintiff's Exhibit NNN, Arthur A. Navarro; Plaintiff's Exhibit OOO, Charles Van Sipma; Plaintiff's Exhibit PPP, Norman Kirnes; Plaintiff's Exhibit QQQ, Harry Gamler; Plaintiff's Exhibit RRR, Benjamin J. Shapiro.)

* * *

HENRY PETERSON

recalled as a witness on behalf of defendant, previously sworn.

The Clerk: You may resume the stand, having previously been duly sworn.

Direct Examination

By Mr. Groner:

Q. You have been heretofore sworn, Mr. Peterson? A. I have, yes.

Q. You are the president of the intervening defendant in this case? A. I am. [219]

Q. When, as well as you can recall, did you form the Feature Ring Co.?

A. Approximately 15 years ago.

Q. That was about 1934, '35?

A. Approximately.

Q. Will you speak a little louder so Mr. Mellin will hear? A. I will try.

Q. And will describe the type of products you have made during that period, and up to April of 1948?

A. We have made engagement rings and wedding ring combinations.

Q. When did you first become interested in the idea of interconnecting wedding rings and engagement rings?

A. From this period, about six years ago.

Q. And what caused you to become interested in such interconnection?

A. The purpose of time, plus ideas of my me-

(Testimony of Henry Peterson.)

chanics, plus demands of the public to where they wanted rings that did not turn on the finger. In some cases, we were asked to solder the bottom of two rings together so that they did not turn on a woman's finger.

Q. When did the wedding ring commence to be used with some diamonds on it but not all around?

A. I don't know exactly when, but a good many years ago.

Q. And is it that type of ring only which creates discomfort by turning? [220]

A. I should imagine so.

Q. Now you said about six years ago, you became interested in this. Will you follow your course from there on?

A. Six years ago I started to experiment with an interlocking set, and I had it in several stages, some of which—some of my customers wanted them. But I didn't think it was good enough to market. When I finally reached a stage when I thought I had a good interlocking set, I naturally wanted to market the product, and I wanted to have it patented. So I asked my attorney at that time to search the records to see whether my particular project was an infringement on anyone else's, before I put it on the market, or before I applied for a patent.

The Court: And about when was this?

The Witness: This was in 1946 or '47. I think it was around that time.

A. (Continuing): The search produced a pat-

(Testimony of Henry Peterson.)

ent which was similar to what we had produced in our factory. It wasn't exactly the same, by any means, but the wording of that particular*ly* patent had me guessing as to whether we would not infringe in this other person's ownership of that patent. At that time I came to you, Mr. Groner, and I showed you the search that this other attorney had made, and I asked you for your opinion as to whether we would be infringing upon anyone in the event we marketed this particular interlocking set. And you said, yes, we would. So I asked you what could be done about it. You said [221] that the only way was to buy the patents from these other people who owned them, which we did. We bought the patents, and we started to market our interlocking sets on the basis of acquiring this patent. Only then did we market our interlocking sets.

Q. Well, now, before your marketed your interlocking set, what was the procedure adopted by you with respect to a trademark?

A. We wanted to call it by a certain name, and we felt that the best way, the best name to call our interlocking set by, would be one befitting the product. Naturally we didn't want to infringe on anyone else's trademark, regardless of what trademark was being used by what manufacturer; so we thumbed through all possible trademarks pertaining to interlocking sets, and we picked one that we were more than sure would not infringe upon any-

(Testimony of Henry Peterson.)

one's trademark, and we applied for "Feature Lock".

Q. Did you in the process reject several suggested marks which seemed attractive to you?

A. I did. I felt that we would be too similar to what other people were using. Some were using "Love Lock", some were using "Bridal Lock", some were—there was Granat products which use "Wed Lok". There were a lot of locks being used, not only "Feature Lock" or "Wed Lok". And I thought the best way out would be to use a name which in no way came near anyone else's. So I applied for registration of "Feature Lock", and I got it.

Q. Now I hand you Defendant's Exhibit 6 (handing to witness). Is that the registration you refer to? [222] A. That is correct.

Q. And despite the fact that the Granat marks were registered in the Patent Office, the Patent Office granted you this registration, No. 506514?

A. That is correct, sir.

Q. And in drafting the application upon which this registration was based, you disclaimed the word "lock", did you not? A. I did.

Q. Now in connection with your use, since that time, has there been any use of the word "lock" except as descriptive of the particular product to which the mark has been applied?

Mr. Mellin: Just a moment, please. May I hear that question?

(Testimony of Henry Peterson.)

(Previous question read by the reporter.)

Mr. Mellin: I object to that question, your Honor, on the ground that it is usurping the power of the court and calling for the conclusion of the witness.

The Court: I think it is calling for the conclusion of the witness. Sustained.

Mr. Groner: May it please your Honor, the witness' intent, I think, is material to the inquiry here.

The Court: Well, I think what his intent might be is a question for me to decide. He can tell what he did.

Q. (By Mr. Groner): Let's develop that, Mr. Peterson. After you adopted the words "Feature Lock", will you explain what your [223] policy was with respect to the sale of your interlocking sets? Tell the court how you sell them and to whom you sell them and the general surrounding circumstances.

A. We manufacture only the blanks. We advertised the——

Q. Now what do you mean by "blanks"?

A. The mountings, without diamonds. We don't sell to the retail trade, with the exception of the so-called chain store concerns and jobbers and wholesalers. We advertise it widely in all the magazines in the country, almost all—if there are some that we haven't advertised in, I don't know. We supplied mats, we supplied stuffers, we supplied warranty instruction booklets, we supplied——

(Testimony of Henry Peterson.)

Mr. Groner: Excuse me just a moment. Would you mind reading back to me the last part of the answer?

(Last portion of previous answer read by reporter.)

A. (Continuing): ——counter cards, and a lot of other material that for the moment I just can't think of.

Q. Now can you state about when your product, the interlocking product, I mean, bearing the name "Feature Lock", first appeared on the market?

A. About May '48.

Q. In that month did you do any national advertising? A. Just in trade magazines.

Q. And how many of the trade magazines did you advertise in?

A. I believe there were about eight. [224]

Q. And did that include substantially all of the large trade magazines in the country?

A. If there are any others, I don't know of them.

Mr. Groner: I call attention, if it please your Honor, to the fact that the Jewelers' Circular Keystone, introduced by the plaintiff as Exhibit I, is one of those magazines.

Q. And I hand you, Mr. Peterson, a copy of the Pacific Goldsmith for May 1947, and I ask you if you have an advertisement in that magazine (handing to witness). It is on page 19.

A. Yes, that is our ad.

(Testimony of Henry Peterson.)

Q. Does that contain the name of "Feature Ring Co."? A. Yes, sir.

Mr. Groner: Would your Honor care to look at it?

The Court: It is the same as this one here?

Mr. Groner: Very much so.

Q. Now in that same magazine, was there a news article which would serve to explain to at least a section of the public, on page 146, I think, Mr. Peterson? A. Yes, there is.

Q. Would you mind reading that, if you please?

A. "New Feature Ring Co. locking device. The Feature Ring Co., New York City, announces that it has perfected a new development known as the 'Feature Lock', a device that keeps matching engagement and wedding rings from twisting and turning, thereby insuring a complete integration of the twin designs. [225]

"The device itself is a tiny, interlocking catch, entirely hidden from view when the rings are worn, leaving no extending parts to rip or tear gloves, hosiery, clothing. According to Henry Peterson, President and founder of the company, 'Feature Lock' was perfected only after intensive development work, research and exhaustive testing.

"To acquaint the consuming public with the advantages of 'Feature Lock' rings, retailers will receive from their distributors a course of sales-promotional material, including newspaper mats, illustrated warranty and instruction booklets, displays, etc."

(Testimony of Henry Peterson.)

It is announced:

" 'Feature Lock' is sold only through authorized distributors who are granted the right to sell the patent Feature Lock under their own brand name or the registered name 'Feature Lock', states the Feature Ring Co. 'Feature Lock' is patented in the U. S. Patent Office, No. 2029464-2127766, and other patents pending."

Mr. Groner: I should like to introduce the May issue of the Pacific Goldsmith at this time, if it please your Honor.

* * *

Mr. Groner: Sorry. Is this Defendant's 7?

The Clerk: Yes, sir, Defendant's 7. [226]

(May issue of Pacific Goldsmith referred to above was thereupon received in evidence and marked Defendant's Exhibit No. 7.)

Q. (By Mr. Groner): Now how many dealers have you had, Mr. Peterson, who have sold this product? A. A few hundred.

Q. Have you discussed the selling methods which you employ with any of them?

A. We have explained to them that they can receive all this advertising material which they in turn should impart to their retail customers, and by these few hundred distributors we reach possibly ten to 20 thousand retailers or maybe more.

Q. Now you spoke of the mats that you had furnished these customers of yours. I hand you a yellow

(Testimony of Henry Peterson.)

folder with a number of sheets beneath it. (Handing to witness.) Is this illustrative of the type of material you furnished to your customers?

A. That is right. These are copies of the mats that they could receive by us for their retail trade.

Q. And do those mats contain the top yellow cover that you have here in your hand?

A. No, the mats are——

Q. No, I mean the material which you submit to your customers, is it like this? (indicating).

A. Yes, sir.

Q. With this yellow sheet on the top?

A. That is correct. [227]

Q. And with the name "Feature Ring Co." at the bottom of it? A. That is correct.

Q. Now there is some handwriting on that folder. Would you read that for us?

A. "All figures approximate." You mean this: "All advertising mats first used in May '48. Used about 600 books."

Q. And then when you say "books" you mean——?

A. Complete books, like this (indicating).

Q. You mean the thing you have in your hand?

A. Yes. "About 180 customers".

Mr. Groner: I should like to introduce that, if it please your Honor, as Defendant's Exhibit 8.

The Clerk: Defendant's 8.

(Booklet of newspaper mats referred to above

(Testimony of Henry Peterson.)

was thereupon received in evidence and marked Defendant's Exhibit No. 8.) [228]

The Witness: By "customers", I mean distributors.

Mr. Mellin: Not retailers?

The Witness: No, wholesale distributors.

Q. (By Mr. Groner): Now, you also provide your customers with this counter card which I hand you? A. That is correct.

Q. And it bears the words "Look, they lock"?

A. That's right.

Q. And what does it say beyond that?

A. "First used August 1948. Figures approximate. Used 5000 cards for 180 customers."

Q. Does that card which you have just referred to use the expression, "Look, they lock"?

A. It does.

Q. And then does it say, "Ask to see the secret lock"? A. That is correct.

Q. And then does it say, "Wear them separately, lock disappears"? A. That is right.

Q. And it uses the trade-mark "Feature Lock"?

A. That is right.

Q. As descriptive of that particular type of ring to distinguish it from other type rings made by you?

A. That is correct, sir.

Mr. Groner: I should like to introduce that as defendant's next in order, if it please your Honor.

The Clerk: No. 9.

(Testimony of Henry Peterson.)

(The counter card referred to was received in evidence and marked Defendant's Exhibit 9.)

Mr. Mellin: Can I have that question and answer again, please?

(Previous question and answer read.)

Mr. Mellin: I make a motion to strike that as being purely calling for the conclusion of the witness.

The Court: Well, the statement that it distinguishes from other rings, I think that that is.

Mr. Mellin: That part can go in, but as to the descriptive——

The Court: Yes, "descriptive," that word may go out and that part of the answer.

Q. (By Mr. Groner): Now, I hand you a proof and ask you if this is an advertisement of the "Feature Ring Company" (handing to witness).

A. It is.

Q. And did that appear in the magazines appearing at the top of that proof? A. It did.

Q. Would you mind reading it?

A. "As seen in Executive Jeweler, Jewelers Circular Keystone, Mid-Continent Jeweler, National Jeweler, Northwestern Jeweler, Pacific Goldsmith, Southern Jeweler, and Jewelry." [230]

Q. And they are all trade magazines?

A. That is right.

Q. And that is the two-page advertisement as it appeared in those various magazines?

A. That is correct.

(Testimony of Henry Peterson.)

Q. And at the bottom of each of those pages is the words "Feature Ring Company of New York"?

A. That's right.

Mr. Groner: I should like to introduce that, if it please your Honor, as defendant's next in order.

The Clerk: No. 10.

(Advertising proof referred to was received in evidence and marked Defendant's Exhibit 10.)

Q. (By Mr. Groner): I hand you another booklet of mats (handing to witness). Did you furnish that also to some of your customers? A. I did.

Q. Can you state about how many?

A. How many mats to individuals, or just the books?

Q. Well, as it states on the face of it there, please.

A. Well, books, all figures approximate, used about 600 books, sent to about 180 customers. The individual mats, of course, are much more.

Mr. Mellin: Much more what?

The Witness: Well, each, we have used——

Mr. Groner: He said approximately.

The Witness: For instance, these, this first mat, we have 1280 mats, and then so on, each page. This is 1380 mats.

Q. (By Mr. Groner): Suppose you read them all the way through.

A. 1350 mats of this one. Of course, by now they

(Testimony of Henry Peterson.)

are much more. 1250 mats of this one. 1200 mats of this one. 1250 mats of these.

Mr. Mellin: None of the rest?

The Witness: No, that is a ring design, which go with every book. There are no mats with them. If there are mats, we haven't got them listed.

Mr. Groner: I should like to introduce these as defendants' exhibit next in order.

The Clerk: No. 11.

(Booklet of mats referred to was received in evidence and marked Defendants' Exhibit 11.)

Q. (By Mr. Groner): Now, one more advertisement. What is this (handing to witness)?

A. This is a stuffer, which we have used 15,000 of approximately.

Mr. Mellin: Would you tell me what a stuffer is?

The Witness: Well, they fold up and you put them into an envelope when the retailer sends out a statement to a customer. It is sort of an advertisement. [232]

Mr. Mellin: You get that with the bill?

The Witness: That is right, with the bill.

Mr. Groner: I should like to introduce that as defendants' next in order.

The Clerk: No. 12.

(Advertising stuffer was received in evidence and marked Defendants' Exhibit 12.)

Mr. Groner: To avoid taking any more time

(Testimony of Henry Peterson.)

than is necessary, I have a collection of other material here.

Q. Would you glance over these, Mr. Peterson, and tell me first whether this is representative of the advertising material which the defendant has sent out, and the quantities in which each particular piece has been sent out?

A. They are all ads, are advertising material, and this first stuffer we have used approximately—we have used about 25,000 of these, about 45,000 of these.

Q. The number appearing on each one? You are reading from the particular one, is that correct, Mr. Peterson?

A. That is right. 45,000 of these, 6000 of these, 25,000 of these, 5000 of these, about 400 of these, 2000 of these, 2000 of these, and 5000 of these, 5000 of these.

Mr. Groner: If I may, I will put these all in the envelope and then introduce them as the same exhibit.

The Court: One exhibit?

Mr. Groner: One exhibit. I think it tends to simplicity. [233]

Mr. Mellin: May I look at them, counsel?

Mr. Groner: Surely.

Mr. Mellin: The first two do not have the name of Feature Ring Company. Is that true of all of them?

The Witness: That is advertising material to our

(Testimony of Henry Peterson.)

customers. I don't think—let me take a look at them—These go to our distributors. Our distributors put their names in.

Mr. Mellin: I apologize to you, counsel. I am not trying to take your witness.

Mr. Groner: It is perfectly all right. I am just trying to get a little more ammunition.

Mr. Mellin: Does the Feature Ring Company appear?

The Witness: No. Our distributors used their own names.

Mr. Mellin: That is all I want to know. Thank you. Are you going to offer them?

Mr. Groner: Yes. I offer this as Defendants' Exhibit No. 13.

(Advertising stuffers were received in evidence and marked Defendants' Exhibit 13.)

Q. (By Mr. Groner): I hand you now a blank of an advertisement with a typewritten page attached to it, giving the names of various magazines and the dates of publication. Is that an advertisement which Feature Ring had issued and is that a statement of the magazines in which it appeared?

A. That is correct. [234]

Mr. Groner: I should like to introduce that, if your Honor please, as Defendants' Exhibit 14.

Mr. Mellin: Does that have "Feature Ring Company" on it?

Mr. Groner: Yes.

(Testimony of Henry Peterson.)

The Witness: Yes.

(Advertising blank with typewritten page attached was received in evidence and marked Defendants' Exhibit 14.)

Q. (By Mr. Groner): I hand you another similar sheet. A. That is right.

Mr. Groner: I should like to introduce that as Defendants' Exhibit 15.

(Advertising blank was received in evidence and marked Defendants' Exhibit 15.)

Q. (By Mr. Groner): Still another, Mr. Peterson? A. That is right.

Mr. Groner: I should like to introduce that, if it please your Honor, as Defendants' Exhibit 16.

(Advertising blank was received in evidence and marked Defendants' Exhibit 16.)

Q. (By Mr. Groner): Now, Mr. Peterson, after you had come on the market with your product how soon did you hear from the plaintiff?

A. Very shortly after.

Q. Did you ever hear from this plaintiff directly? A. No, sir. [235]

Q. Did he ever notify you of any alleged infringement? A. No, sir.

Q. Despite the fact that you had advertisements in all the trade magazines in May 1948?

A. That is correct.

Q. How did you hear of this plaintiff?

(Testimony of Henry Peterson.)

A. This plaintiff was sending letters to all my customers threatening them with suit.

Mr. Mellin: All of them?

The Witness: Well, I say "all". I don't know how many actually, but a good many of them. To me it seemed as if it was all, because all I got was long distance call after call, letter after letter, people becoming panicky that they had better stop using the trade-mark Feature Lock, otherwise they intended to sue them.

Q. (By Mr. Mellin): The letters said that, you mean?

A. Words to that effect. I don't exactly know the wording, but it was a threatening sort of letter. It led most of my customers to call me up or write me asking what to do.

Mr. Mellin: Mr. Reporter, will you mark that question and answer for me.

Q. (By Mr. Groner): I hand you a copy of what purports to be a letter from Mr. Joseph B. Gardner to Kay Jewelers, dated April 8, 1948, and ask you if you know anything about that.

The Court: Do you wish to see it first? [236]

Mr. Mellin: No, but if your Honor please, if this is not in connection with the trade-mark "Feature Lock" I want to object to it. I would like to object to it on that ground.

The Court: Well, you may see it first.

(Document handed to Mr. Mellin.)

Mr. Mellin: This, your Honor, relates to the use

(Testimony of Henry Peterson.)

of the trade-mark "Tru-Lock" that they were sued upon and has no relation and does not mention "Feature Lock", and on that ground it is immaterial.

Mr. Groner: May it please your Honor, first off, I haven't offered it yet. I shall ask your Honor receive it—I wanted to bring out some of the facts to establish a sufficient background for it.

The Court: Very well.

Q. (By Mr. Groner): Would you mind stating what that letter is?

A. It is a letter asking them——

Q. Asking whom?

A. Asking Kay Jewelers to discontinue the use——

The Court: From whom was the letter?

The Witness: The letter is from Joseph B. Gardner, the Central Bank Building, Oakland, California, which I believe was the attorney for Granat Bros. at that time.

Mr. Groner: There is no question about that, is there, Mr. Mellin? [237]

Mr. Mellin: No.

The Witness: If I may read this——

Mr. Groner: Surely.

A. It is quite some time ago.

"Gentlemen:

Our attention has been directed to an advertisement of yours which appeared in the 'Los Angeles Examiner' under date of March 28, 1948. The ad-

(Testimony of Henry Peterson.)

vertisement relates to an assertedly new interconnecting ring ensemble or combination identified by the term 'Tru-Lock'. We have furthermore inspected the rings as so offered for sale in your store.

For many years, this exact type of goods has been manufactured and sold nationally under the trademark 'Wed-Lock' or 'Wed-Lok' by our client Granat Bros., Inc. of San Francisco, California. Over the years large sums have been expended by Granat Bros. in advertising and otherwise creating a valuable good will for its products under the trade-mark 'Wed-Lock' or 'Wed-Lok'. These trademarks are protected by United States Registrations No. 185,365 of June 10, 1924, and No. 430,436 of June 10, 1947, and are filed for re-registration under the Lanham Act.

We are convinced without reservation that the contemporaneous use of 'Tru-Lock' and 'Wed-Lock' to [238] identify identical types of ring ensembles of different manufactures will most certainly cause confusion in the trade and in the minds of the purchasing public. It is also our position that your acts in offering to sell the goods in question under 'Tru-Lock' will mislead and deceive the public and enable you to take advantage of the good will and business reputation that our client has established in connection with the goods sold by it under the name 'Wed-Lok' or 'Wed-Lock'. Your use therefore of 'Tru-Lock' is considered to be an infringement of the trade-mark rights of our client, and in

(Testimony of Henry Peterson.)

view thereof you are hereby notified to immediately discontinue the use of 'Tru-Lock' on the goods aforesaid. Please inform us promptly of your position in the premises.

We note from your advertisement and from an inspection of the so-called 'Tru-Lock' rings, that the word 'Patented' is applied to such rings. An investigation has been made by us for ascertaining all unexpired patents other than those owned or controlled by our client, which might relate to your rings. However, we have been unable to find any patent as a result of such investigation of other than the Granat Patents, which we feel covers the construction of your rings. The Coleman Patent No. 2,127,766 appears to [239] bear the closest resemblance to your rings, but we cannot see where the claims of this patent embrace said construction. Under the circumstances therefor, we request that you kindly advise us of the basis for the patent mark aforesaid.

Very truly yours,

/s/ JOSEPH B. GARDNER."

Mr. Mellin: What is the date of that letter, Mr. Peterson?

The Witness: April 8, 1948.

Mr. Mellin: That is before you commenced manufacturing rings?

The Witness: No, that is not true. We held back——

(Testimony of Henry Peterson.)

Mr. Mellin: But the advertisement appeared March 1——

Mr. Groner: Wait a minute, Mr. Mellin. I will attempt to bring out the facts.

Q. Mr. Peterson, you stated some time ago that you appeared on the market with that in May of 1948? A. That could be.

Q. Now, was Kay Jewelers a customer of yours?

A. That is correct.

Q. And that letter is dated April 8, isn't it?

A. That is right.

Q. Now, can you explain that seemingly discrepancy?

A. We had an arrangement with the Kay Jewelers to give them, I believe it was, either 60 or a 90-day exclusive on this interlocking [240] set because in return they were going to publicize it greatly by going through a tremendous advertising program and they were to use our interlocking set exclusively; in return they would use—we granted them the right to use Tru-Lock as their own trade-mark——

Q. You didn't grant them that right?

A. Not exactly "grant".

Q. You mean you didn't object?

A. We didn't object; that is correct.

Q. On that score isn't it a fact that you have constantly represented to the trade that the trade could either use your trade-mark, Feature Lock, or their own mark if they desired to do that?

(Testimony of Henry Peterson.)

A. That is entirely correct. [241]

Thursday, March 17, 1949—10:00 A.M.

* * *

Mr. Groner: May it please your Honor, reference has been made on a number of occasions to this book, and I should like, if it please your Honor to introduce the title page and page 50, which is the single page to which reference has been made, as Defendants' Exhibit 17.

The Court: It will be received.

(The pages of book referred to were received in evidence and marked Defendants' Exhibit 17.)

HENRY PETERSON

resumed.

Direct Examination
(Continued)

By Mr. Groner:

Q. Mr. Peterson, when we concluded yesterday you had just read a letter from Mr. Gardner to the Kay Jewelers.

I should like to offer that letter, if it please your Honor, as Defendants' Exhibit 18.

(The letter referred to was received in evidence and marked Defendants' Exhibit 18.)

Q. (By Mr. Groner): I hand you now, Mr. Peterson, a letter on the letterhead of Joseph B.

(Testimony of Henry Peterson.)

Gardner, dated April 19, 1948, and addressed to Zale's Jewelers of Houston, Texas, and a copy of a letter [242] on the stationery of Mellin and Hanscom dated August 2, 1948, addressed to Zale's Jewelers, Corpus Christi, Texas. Are Zale's Jewelers customers of Feature Ring Company?

A. They are.

Q. And were those notices sent you by your customer? A. That is correct.

Mr. Groner: May it please your Honor, I should like to introduce the two letters as Defendants' Exhibit 19.

(The letters referred to were received in evidence and marked Defendants' Exhibit 19.)

Q. (By Mr. Groner): I now hand you several letters clipped together, photostats, the top one of which, on the letterhead of Mellin and Hanscom, is addressed to S. H. Friend of San Francisco.

Mr. Mellin: That is the defendant?

Mr. Groner: That is one of the defendants, yes.

Q. You subsequently received that?

A. That is right.

Q. From Friend and Company?

A. I did.

Mr. Groner: I should like to introduce those three letters as Defendants' Exhibit 20.

(The letters referred to were received in evidence and marked Defendants' Exhibit 20.)

Q. (By Mr. Groner): I now hand you another

(Testimony of Henry Peterson.)

clip of three [243] letters, commencing with one on the stationery of Mellin & Hanscom dated July 16, addressed to Morgan Allen Company—(Exhibiting document to Mr. Mellin).

If you will let it go in without objection, why, I will have him identify it.

I should like to introduce it as defendants' Exhibit 21, may it please your Honor.

Mr. Mellin: You are just introducing the letter from Mellin & Hanscom?

Mr. Groner: No, I mean all three of them.

Mr. Mellin: I object to the other two as purely self-serving. They are opinions of two lawyers as to the merits of the matter, one by present counsel and one counsel in San Francisco—merely an opinion as to whether Feature Lock infringes on Wed Lok.

Mr. Groner: I am entirely willing to withdraw mine. Mr. McCune as counsel for the recipient of the letter wrote my client, and I submit, may it please your Honor, that the letter——

Mr. Mellin: Hearsay also.

Mr. Groner: The hearsay rule, I submit, has nothing to do with letters of this sort. These letters in themselves are res gestae. The letter notifying the defendant of infringement started the ball rolling and other letters inevitably followed, and they depict the reaction of the recipients. [244]

Incidentally, if it please your Honor, Mr. McCune

(Testimony of Henry Peterson.)

will be here later today and if there is any question as to his identity——

Mr. Mellin: There is no question of that.

The Court: I understood your objection to be that this is self-serving. This is written by a counsel for one of the customers?

Mr. Mellin: That is right, your Honor, and gives an opinion—as I recall, gives an opinion as to whether this infringes or not.

Mr. Groner: It might be, may it please your Honor, Mr. Mellin's letter expresses a rather broad opinion, but that is not sufficient to rule it out.

The Court: He expresses the opinion that the name "Feature Lock" is not an infringement of the trade-mark "Wed Lok." I do not see what value it would be to the Court if somebody expresses such an opinion.

Mr. Mellin: Well, I will withdraw my objection.

Mr. Groner: I should like to introduce those two letters—the copy of my own letter having been withdrawn—as Defendants' Exhibit 21.

(The letters referred to were received in evidence and marked Defendants' Exhibit 21.)

Q. (By Mr. Groner): I now hand you, Mr. Peterson, a letter on the letterhead of Perel & Lowenstein, Inc., of Memphis, Tennessee, dated August 17, 1948, and addressed to Feature Ring Company. [245] Beneath that is a carbon on the

(Testimony of Henry Peterson.)

letterhead of Feature Ring Company addressed to Perel & Lowenstein dated August 20, 1948, and apparently signed by you as president of Feature Ring Company. Finally, a second letter by you dated August 20 and addressed to Mr. Joseph C. Marmann of Perel & Lowenstein. Did you receive the letter from Perel & Lowenstein which is on top?

A. I did.

Q. Were they customers of yours?

A. They were.

Q. Did you respond as shown in the two carbon copies attached? A. Yes, I did.

Mr. Groner: I should like to introduce those three, if your Honor please, as Defendants' Exhibit 22.

(The letters referred to were received in evidence and marked Defendants' Exhibit 22.)

Q. (By Mr. Groner): I now hand you a clip of correspondence between the Feature Ring Company and D. C. Percival & Co. of Boston, Massachusetts. Did you either receive those letters or did you send the corresponding carbons?

A. I did.

Mr. Groner: I should like to introduce those, may it please your Honor, as Defendants' Exhibit 23.

(The letters referred to were received in evidence and marked Defendants' Exhibit 23.)

Q. (By Mr. Groner): And I hand you another clip of letters, [246] the top one of which is on the

(Testimony of Henry Peterson.)

stationery of Barnett Davis of Pittsburgh, with carbons to Feature Ring Company. Were they sent and received as indicated?

A. That is correct.

Mr. Groner: I should like to introduce those, if it please your Honor, as Defendants' Exhibit 24.

(The letters referred to were received in evidence and marked Defendants' Exhibit 24.)

Q. (By Mr. Groner): And another sheaf, the top one of which is on the stationery of Mellin & Hanscom, dated December 16, 1948, and addressed to Mr. Jack Farrar. Can you identify those?

A. That is correct.

Mr. Groner: I should like to introduce this as Defendants' Exhibit 25.

(The letters referred to were received in evidence and marked Defendants' Exhibit 25.)

Q. (By Mr. Groner): I hand you now another file, the top letter of which is on the stationery of Mellin & Hanscom, dated August 3, 1948, addressed to Julius Dreyfus, Inc. Can you identify those?

A. I certainly can.

Mr. Groner: Defendants' Exhibit 26, if it please your Honor.

(The letters referred to were received in evidence and marked Defendants' Exhibit 26.)

Q. (By Mr. Groner): I now hand you another clip; the top letter here is on the stationery of

(Testimony of Henry Peterson.)

Mellin & Hanscom, dated August 3, addressed to Friedmann Jewelers. Can you identify all of them?

A. I can.

Mr. Groner: I should like to introduce them, if it please your Honor, as Defendants' Exhibit 27.

(The letters referred to were received in evidence and marked Defendants' Exhibit 27.)

Mr. Groner: And another letter which Mr. Mellin has just identified for me written by him to David Sarkin, Inc. If I might, I should like to introduce it as Defendants' Exhibit 28.

(The letter referred to was received in evidence and marked Defendants' Exhibit 28.)

Q. (By Mr. Groner): I hand you now a file, the top letter of which is on the stationery of Ed Kain & Co. of Chicago. Can you identify that?

A. I can.

Mr. Groner: I should like to introduce that, if it please your Honor, as Defendants' Exhibit 29.

(The letters referred to were received in evidence and marked Defendants' Exhibit 29.)

Q. (By Mr. Groner): Now, Mr. Peterson, as a result of the receipt of all these letters did you cause advertisements to be placed in certain trade journals? [248] A. I did.

Q. I hand you now two sheets clipped together and ask you if the under sheet is a reproduction of

(Testimony of Henry Peterson.)

the advertisement as placed, and if the first sheet is a statement of the various publications in which it appears. A. That is right.

Mr. Groner: May I show that to your Honor (exhibiting).

The Court: Is that the same letter that appears in the front of the exhibit you referred to at the beginning of the session today?

Mr. Groner: No, your Honor, I don't think it is in evidence, and I don't believe any prior note——

The Clerk: This is the first one (exhibiting to Court).

The Court: No, the book you had, the cover you referred to.

Mr. Groner: A trade magazine? I don't believe that is in evidence.

The Court: Isn't it on file?

Mr. Groner: No, I don't believe so.

Mr. Naylor: That is the trade-mark listing.

Mr. Groner: May we have that first one? That simply lists all jewelers' trade-marks, and it has Granat's, too.

The Court: I thought it was in evidence.

Mr. Mellin: That letter is in evidence, your Honor. I put it in in my case. [249]

The Court: It is already in evidence.

Mr. Groner: Excuse me; I didn't realize you put it in. I am somewhat swamped in the volume of advertising material here.

(Testimony of Henry Peterson.)

The Court: I think it is Vogue.

Mr. Mellin: No, it is in the Jewelers' Circular Keystone that I offered earlier in the trial. It is right opposite a Feature Lock ad. I offered both pages.

Mr. Groner: I should like to introduce it, if it please your Honor, as Defendants' Exhibit 30.

The Clerk: No. 30.

(The copy of advertisement and list of publications were received in evidence and marked Defendants' Exhibit 30.)

Q. (By Mr. Groner): Now, Mr. Peterson, yesterday we were talking something about your business, and you referred to the fact that you had started business under the trade name of "Feature Ring Company" about fifteen years ago. I hand you a photostat of a certificate of doing business (handing to witness).

Mr. Mellin: I will stipulate to that.

Q. (By Mr. Groner, continuing): ——and I will ask if that is the certificate of your company?

A. It is.

Mr. Groner: I should like to introduce that, if it please your Honor, as Defendants' exhibit next in order.

The Clerk: No. 31.

(The certificate was received in evidence and marked [250] Defendants' Exhibit 31.)

(Testimony of Henry Peterson.)

Q. (By Mr. Groner): Now, Mr. Peterson, yesterday during your testimony you referred very briefly to your outlets or distributors. I understand that you sell only through your distributors; that is correct, isn't it? A. That is correct.

Q. Would you mind stating first, as of last April-May, 1948, and then as of today, how many distributors you have?

A. I didn't get that question. I am sorry.

Mr. Groner: Will you read it back, please?

(Question read.)

A. Last April or May I had about three or four hundred distributors, and now I think I have about the same amount today.

Q. Now, have you any idea—strike that, please. Could you state where those distributors are located? A. All over the country.

Q. Is there any part of the country not covered by those distributors? A. No.

Q. Could you make an estimate of the number of retailers covered by each of those distributors?

A. That would be a very hard guess.

Q. Well, do your best.

A. Well, I would imagine that a distributor has a minimum of possibly a hundred and maybe a maximum of two or three thousand. [251]

Q. Is there any way you can form an estimate as to the number of distributors covered, or the number of retailers covered by all your distributors?

(Testimony of Henry Peterson.)

A. Well,——

Mr. Mellin: If you multiply a guess by a guess, that will give it to you.

A. Well, if you multiply 400 by 200, you would have a very small estimate.

Q. (By Mr. Groner): Now, getting away from the realm of guess, can you state the number of Feature Lock sets manufactured by your company which were sold to these distributors of yours during the year 1948? Now, that means starting in maybe in April or May of 1948, and extending through December 31.

A. I should imagine we sold 70 to 80,000 sets.

Q. Now, you say you imagine that. Don't you know that you have sold that number?

Mr. Mellin: That is leading, counsel.

A. I know that we haven't sold less than 70,000, but I am not quite sure whether we reached the 80,000 mark.

Q. (By Mr. Groner): Now, these sets which you sell are simply findings, are they not?

A. They are sets without the diamonds.

Q. And they are called findings or blanks?

A. Findings or blanks or mountings.

Q. And your product never includes the diamonds? [252] A. No.

Q. And the diamonds invariably are put in the product either by the distributor or by the retailer who is sold by the distributor; isn't that correct?

A. That is entirely correct.

(Testimony of Henry Peterson.)

Q. Could you place an average sales price for the sets which were sold during the year 1948?

Mr. Mellin: You mean the findings or afterwards?

Q. (By Mr. Groner): For the findings.

A. Approximately $14 to $15 per set.

Mr. Mellin: Of the two rings?

The Witness: Two rings.

Q. (By Mr. Groner): Now, can you state the average value of these $14 to $15 sets after the diamonds have been mounted?

A. An approximate average would be anywhere from $150 to $250 per set.

Q. Now, in computing that average, what is the minimum within your knowledge?

A. It would be approximately $14,000,000.

Mr. Groner: Would you read the question back? I don't think he understood me.

(Question read.)

Q. (By Mr. Groner): The minimum per set of a mounted set. A. Minimum?

Q. Yes. [253]

A. That would be about $85, $90.

Q. And the maximum of such sets, within your knowledge? A. A thousand dollars, $1200.

Q. Now, on the basis of a minimum of an average of $150 a set, could you state the value of the sets sold by you after having been mounted?

A. You would have to multiply by 70,000 or 80,000 sets; you would have to multiply that by

(Testimony of Henry Peterson.)

$150. That would be about $15,000,000 or $16,000,000, something like that.

Q. Now, coming back again to your business, can you state the volume of that business, gross, in the year 1948?

Mr. Mellin: Is this limited to these rings?

Mr. Groner: No.

A. The total gross?

Q. The total gross of your business in the year 1948.

A. I don't have the exact figures, but I should say between two and a quarter million and two and a half million dollars.

Q. And what percentage of that, according to your best figure, was accounted for by Feature Lock sets? A. About a million dollars worth.

Q. And during the year 1947, what was the volume of your gross business?

A. About a million and a half dollars.

Q. There were no Feature Lock sets during that year? A. None whatever. [254]

Q. What was the gross volume of your business in 1946?

A. About a million and three-quarters.

Q. And in 1945?

A. Approximately a million and a half.

Q. Now, during this period—that is, from 1945 through 1948—can you state how many employees you had? I want it as nearly exactly as you can state it, year by year.

(Testimony of Henry Peterson.)

A. I don't know just how many we had in 1945, but I can go from '48 down, if that will be satisfactory.

Q. Do your best.

A. In 1948 we had about 225 employees. In 1947 we may have had approximately 200, and in 1946 we may have had 220 or 225, or somewhere, as much as we did in 1948. In 1945 we may have had 160 or 170.

Q. Now, coming to the Feature Lock sets, and the year 1949, as far as it has progressed, can you state how many Feature Lock sets you have sold in 1949?

A. When I left New York we had sold about 35,000 sets.

Q. And when did you leave New York?

A. Last Thursday.

Q. A week ago today?

A. A week ago today.

Mr. Groner: Will your Honor help me out and give me the date? I saw you looking at the date there.

The Court: It would be March 10. [255]

Mr. Groner: Thank you, sir.

Q. Mr. Peterson, can you state the cost to Feature Ring Company of its advertising of the Feature Lock ring during 1948?

A. A little over $35,000. [255-A]

Q. How about thus far in 1949?

(Testimony of Henry Peterson.)

A. We have let contracts go for about $65,000 already.

Q. Do you have an example with you of one of the subjects of those contracts?

A. This is a model of our new counter card. In fact, this is a finished proof (producing counter card and handing to counsel).

Mr. Groner: May I introduce that as Defendant's Exhibit 31?

The Clerk: No. 32, sir.

(Counter card referred to above was thereupon received in evidence and marked Defendant's Exhibit No. 32.)

Q. (By Mr. Groner): Now when you gave the cost of this advertisement for 1948 and thus far in 1949, I understand that it includes both the trade magazine advertisements and various types of advertisements which you hand to your distributors to be handed to the ultimate retailer?

A. That is correct.

Q. Now do the distributors, and do the retailers, receive the mats and so forth from you, pay for their own advertisements in local publications?

A. They do.

Q. Have you any idea as to the amount they have employed the mats furnished by you in local newspaper advertising?

Mr. Mellin: I am going to object to that if it is

(Testimony of Henry Peterson.)

only an idea or a guess or a surmise, unless there is some basis for basing his figure. [256]

Q. (By Mr. Groner): Would you mind making your answer, Mr. Peterson, bearing in mind what my brother has said in stating the basis upon which your conclusion is reached?

A. We too subscribe to a clipping service, and we have written to our customers asking them to send to us tear sheets of their ads, as we are always interested as to what progress they were making in the advertisement of Feature Lock. They would be very kind and send them in to us. We have, back in New York—unfortunately they are not here—pile after pile of tear sheets of newspaper advertising. I don't know the exact value of it. I wouldn't take it upon myself to venture a guess, but I have been told by people who have far more experience——

Q. Wait a moment. Don't say what you have been told, just stick to your own knowledge. Could you estimate from what you have seen, the number of such advertisements?

A. A very small guess would be a million dollars.

Q. Now how about the number of advertisements?

A. Oh, I have got so many I couldn't count them.

Q. Now I hand you three pieces torn from newspapers and ask you if you will look at them and tell me if they are typical of the type of advertise-

(Testimony of Henry Peterson.)

ment we are now talking about (handing to witness).

A. These are small ones. We have much larger ones than these, but these are typical of the advertising of Feature Lock.

Mr. Groner: Does your Honor care to see them?

The Court: Yes.

(Newspaper clippings handed to the Court by Mr. Groner.)

Mr. Groner: I should like to introduce these, if it please your Honor, as Defendant's Exhibit 33, these three pieces of newspaper pages advertising the Feature Lock; and in each case the retailer sponsor is Hamilton Diamond Company of Los Angeles.

The Clerk: No. 33.

(Newspaper clippings referred to above were thereupon received in evidence and marked Defendant's Exhibit No. 33.)

Q. (By Mr. Groner): Now, in addition to the material which you sent to your distributors and retailers,—mats and materials of that sort, particularly—have any of these retailers written you for additional materials? A. They sure have.

Q. Has that happened frequently?

A. It does.

Q. Have retailers also written to Feature Ring Co. voluntarily asking for Feature Ring line?

(Testimony of Henry Peterson.)

A. For Feature Lock?

Q. Yes. A. They certainly have.

Q. That has happened frequently?

A. It happens every day.

Q. Now have any of these retailers ever asked you for Wed Lok? A. No. [258]

Q. You stated yesterday and again I am asking of the type of advertisement which you furnished the distributors and to retail dealers, that that material did not bear the name "Feature Ring Co." Can you explain why that is?

A. It is a common fact in the jewelry industry, when supplying distributors with advertising material, not to put the manufacturer's name on the material, so as to give them an opportunity——

Q. Who do you mean, "them?"

A. The distributors. To give the distributors the opportunity of putting on their name on the bottom or on the top, wherever they choose, of the advertising material.

Q. What would be the reaction of the distributor if you did put your name on?

A. They just wouldn't buy any merchandise from us. We can't go to the retail trade with our name; it is not our customer. It is the customer's customer.

Q. Now from the beginning of the Feature Ring Co., how would have your goods, sent to your distributors, been packaged?

(Testimony of Henry Peterson.)

A. In envelopes bearing "Feature Rings" or "Feature Ring Co."

Q. And how have those rings been marked or stamped? A. "F. R. Co."

Q. Do you still follow that practice?

A. I do.

Q. With respect to packaging? [259]

A. With one exception; where the distributor chooses his own trademark, we put his trademark in instead of ours. But we do not ship a ring out of our plant without a trademark in it.

Q. A trademark or a name or an abbrevation of such? A. That is correct.

Q. Now as I understand it, your rings, not Feature Locks, which are shipped out of your plant today, will have "F. R." or "F. R. Co." stamped on the inside of the band, is that correct?

A. That's right, sir.

Q. Now what is your practice with respect to Feature Lock?

A. We stamp "F. L. Patented" and the trademark.

Mr. Mellin: You mean "F. L." and "Patented?"

The Witness: That's right. "Feature Lock" is too long to put inside of a shank. We have to leave room for a customer to put in their initials. So we have to abbreviate it.

Mr. Mellin: I will stipulate that that is done.

Mr. Groner: Thank you, sir.

(Testimony of Henry Peterson.)

Will your Honor indulge me while I hunt?

The Court: We will take a recess.

(Recess.)

Mr. Groner: May it please your Honor, I learned during the recess that there has been a misapprehension of one of my questions. I should like to ask it over again, if I might.

Q. Mr. Peterson, I asked you some time ago in the early part of this hearing how many distributors you had and you answered [260] about 400, I think. A. That is right.

Q. Would you mind stating what you have 400 distributors for?

A. For the Feature Rings as a whole.

Q. Now how many distributors have you for Feature Lock sets? A. Approximately 200.

Q. Does that approximation apply from last April-May, 1948, up to date, or has it grown somewhat in the period?

A. I think it has grown definitely.

Q. Well now, could you set a minimum figure of the number of Feature Lock distributors during the early introduction period of Feature Lock?

A. Seventy-five to 100 to start with, the first month or two.

Q. And it has now grown, you say, to about 200?

A. At least.

Q. Now is your coverage through those Feature

(Testimony of Henry Peterson.)

Lock distributors national or is it only part of the United States?

A. It is national, coast to coast.

Q. And could you estimate the number of accounts per distributor handling Feature Locks?

A. There again I would have to venture a guess that it might be, oh, from 100 to a few thousand.

Mr. Mellin: Apiece?

A. Each customer, each distributor.

Q. (By Mr. Groner): Now your statements of sales during the [261] year 1948 and then the year 1949 were not statements of sales of Feature Rings but of Feature Lock? That is correct, is it not?

A. I didn't get the first part of the question.

Q. You made a statement following your earlier about the number of dealers you had, you made a statement about the sales of Feature Lock as between 70 and 80 thousand in 1948?

A. That is correct.

Q. You weren't referring to Feature Rings or rings then but to Feature Lock sets, were you not?

A. Only the Feature Lock sets. It has no bearing on our other production.

The Court: He has definitely so stated.

Mr. Groner: I thought so, but there is a contiguity there that I wanted to be sure we didn't leave ambiguous.

Q. Now Mr. Peterson, I hand you the Pacific Goldsmith for May, 1947, which is Defendant's Exhibit 7, and I turn to page 19, which is the

(Testimony of Henry Peterson.)

Feature Lock advertisement. There are three black —five black boxes in that advertisement, one at the top containing the words "Feature Lock Ring mountings," and then three horizontal ribbons appear with various statements of the quality or character of the mountings, and I indicate the topmost one of those. Would you mind reading it for me, please?

A. "Individual mountings with the patented Feature Lock are perfect streamlined rings in themselves."

Q. Now what do you mean by the "patented Feature Lock?" [262]

A. Well, we have a little lock that comes out of the wedding ring and when not in use it folds back completely out of sight.

Q. Do you have one of those sets with you?

A. I have.

Q. Is the set illustrated in this operation at the lefthand side of the advertisement that you are referring to? A. It is.

Q. Would you mind taking the set which you have and explaining it to his Honor so that he may understand just what its nature is?

A. (Demonstrating): This lock that you see on the wedding ring fits into an opening in the mounting like that and with a twist they lock together. Now when you want to wear them separately and don't want this to stick out, it folds away like that.

(Testimony of Henry Peterson.)

Now they can be sold individually like two rings, as we have done in the past, and you have the interlocking feature as well. It comes right out and can very simply be locked together.

Q. Now I hand you Plaintiff's Exhibit E which I understand is the current set of Granat Wed Lok rings—is that correct, Mr. Mellin?

Mr. Mellin: That is correct.

Mr. Groner: And this is the subject of the exciting announcement that you have averted to before?

Mr. Mellin: Yes, the exciting announcement is the new construction, this construction as exemplified, one of about 15 [263] or 16 different types of Wed Loks. This is the latest type. This is the new addition to the line.

Mr. Groner: I understand.

Q. Now Mr. Peterson, I hand you Plaintiff's Exhibit E. Will you contrast the operation of the locking mechanism there and the locking mechanism in your Feature Lock sets?

A. (Demonstrating): This wedding ring has two knobs sticking out which fit into two holes in the mounting. These cannot be hidden in any way; they stay that way unless they are filed off.

Q. Does that make any difference, Mr. Peterson?

A. It makes a lot of difference. If the person were to wear this separately, it would catch on her stockings, gloves, clothing, silk dress, and it mars the beauty of the set or of the ring itself, rather.

(Testimony of Henry Peterson.)

Q. There is no such protuberance on the Feature Lock sets? A. There is none whatsoever.

Q. And have you ever used the expression "Feature Lock" in conjunction with any product not bearing that—may I see the magazine so I can quote it exactly—patented Feature Lock?

A. No.

Q. Those words "Feature Lock" have never been used on any product of the defendant Feature Ring Co. that didn't have the lock as a part of the product, is that correct?

A. That is correct.

Q. Now returning to this advertisement, Defendant's Exhibit 7, [264] Mr. Peterson, there are some drawings at the side. Would you mind explaining the purpose of those drawings, and explain so that his Honor can understand and follow you, please?

A. In order for our customers to know the fine points of Feature Lock, also for them not to confuse our set with any other set that was either on the market or would be put on the market, we elaborately showed the manner in which our set operates. We felt that we had a practical set, the most desirable set, and we wanted the entire country to know how it works so there should be no doubt in anybody's mind that this particular interlocking set belonged to Feature Ring Co. or was the manufacturer of such a particular interlocking set.

Q. Now in connection with that same thing, have you consistently followed the policy in your adver-

(Testimony of Henry Peterson.)

tising of using contrasting yellow and black and white, Mr. Peterson?

A. We have for some time. We are now deviating somewhat into different colors.

Q. Do you know anyone else who has followed that policy at all in advertising any type of interlocking set? A. I do not.

Q. In connection with your business as president of Feature Ring Co., do you have contacts with distributors and with retailers, Mr. Peterson?

A. I do.

Q. Have you ever acquired any knowledge of confusion between your [265] product and plaintiff's Wed Lok?

A. Absolutely none whatsoever.

Q. Have you consciously taken such steps as you could throughout the history of Feature Lock to distinguish it from any other interlocking set made from any source or by any person at all?

A. I certainly have.

Mr. Groner: The witness is with you, sir.

Cross-Examination

By Mr. Mellin:

Q. Mr. Peterson, I understood you to say—please correct me if I am wrong—that you had about—let's take the overall business—about 400 distributors now? A. Approximately.

Q. Would you say that each of them would sell to a minimum or an average of 200 jewelers?

(Testimony of Henry Peterson.)

A. That is a rough guess, a hundred to a couple of thousand.

Q. Now that in my figures would be 80,000 different retailers, isn't that right?

A. I realize that.

Q. Now as a matter of fact, don't you know that there are only 25,000 retail jewelers in the United States according to the Jewelers' Board of Trade?

A. I understand that.

Q. But you still sell to 80,000, that is 60,000 more than actually exist, is that your testimony?

A. My testimony, I stated that it is purely a guess. We have on [266] our books over 400 distributors, and I venture a guess that they at least have a hundred and I know that some of them have a few thousand. Now it is very possible that different distributors call on the very same customers —that the same customer would be called on by five different distributors, and if you whittle it down, actually there may be only 20,000 retailers covered by the entire amount.

Q. Well now, you think, then, you have probably sold Wed Lok instead of the 80,000 that you seemingly led me to believe, 80,000 retail jewelers, now you say it may be 20,000?

Mr. Groner: Excuse me, Mr. Mellin, I think you misstated. Didn't you say that he sold Wed Lok?

Mr. Mellin: If I did, it was unconscious and I had no—I am talking about Feature Lock.

(Testimony of Henry Peterson.)

The Court: I think you will stipulate that the defendant has not been selling Wed Lok.

Mr. Mellin: Yes.

Q. 80,000—and now you say 20,000?

A. I beg your pardon, your Honor, did you say the defendant was selling Wed Lok?

The Court: I say, counsel will stipulate the defendant is not selling Wed Lok.

The Witness: I am sorry.

Q. (By Mr. Mellin): You now say, instead of 80,000 which was your estimate earlier, you now estimate 20,000 out of the 25,000 [267] retail dealers?

A. Mr. Mellin, what I said was I have three or four hundred distributors, and each of them have anywhere from a hundred to two thousand accounts. Those distributors, some of them, may have the same accounts.

Q. You mean all of them may have one account?

A. I mean you as a distributor may go to Tom Jones in Chicago and every other distributor in Chicago may go to Tom Jones, but I don't. I can't stop them from going wherever they please.

Q. So you don't want to leave the court with the impression you sell 80,000 retail jewelers?

A. No.

Q. As a matter of fact, you are certain from your knowledge of the jewelry business you aren't selling 20,000 of the 25,000 retail firms, aren't you?

A. No, I am not certain; I might be selling 20 of the 25,000, I might be selling 25 of the 25,000.

(Testimony of Henry Peterson.)

Q. So then it is just purely a guess?

A. It is not just purely a guess. The entire country is covered by distributors of mine, and I venture they cover every retailer from coast to coast.

Q. Are all those other estimates you gave here just as accurate as this one you gave?

A. No, they are more to the point, if you are talking exact figures of how many Feature Locks we have manufactured and how [268] much business we have done.

Q. Let's talk about this million dollars you spoke of; as I understand you, you had approximately a million dollars in dealer advertising would be your estimate? A. That is a guess, purely a guess.

Q. Purely a guess. Let's say it might be closer to two hundred thousand?

A. Or two million.

Q. It might be anywhere from two hundred thousand to two million? A. That is right.

Q. Now do you subscribe to that clipping service we introduced the other day?

A. Not necessarily your clipping *serve.*

Q. I meant that particular one.

A. I don't know what you mean, Mr. Mellin.

Q. There was a lady on the stand who represented a clipping bureau.

A. What was the name of that clipping service?

Q. Well, it is of no moment, but does your

(Testimony of Henry Peterson.)

clipping service give you the service of giving you the lineage of Feature Lock ads? That is the Advertising Clipping Bureau, Inc.

A. No, sir.

Q. But they do give you the service of checking your own advertisements and telling you how much they cost in all newspapers they appeared in and the total expenditures by your dealers during the year? [269] A. No.

Q. You don't subscribe to that?

A. No, I don't subscribe to that.

Q. Now when you are talking about advertising —By the way, speaking about advertising, Mr. Peterson, you were talking about yellow and black— that is only the Feature Ring Co.'s advertisements?

A. That is correct.

Q. And all the others go out in black and white?

A. All the other what?

Q. I mean the ones from the distributors to the dealers and the dealers to the public?

A. No, no, that is not so.

Q. There are some different colors?

A. We have a lot of stuffers and displays in black and white.

Q. I am talking about, let's say, the newspaper advertisements.

A. The newspapers are black and white.

Q. And the catalogues of the dealers are black and white, aren't they?

(Testimony of Henry Peterson.)

A. I should imagine in most cases. There are some maybe two-toned.

Q. So that the general public, let's say, they see the black and white ones?

A. In the newspapers but not in stuffers.

Q. Now these advertisements that are put out in the various [270] newspapers, Mr. Peterson, as represented by one of these mats—isn't that so?

A. Yes, sir.

Q. Or something like that? A. That is so.

Mr. Groner: Mr. Mellin, will you give the exhibit number so——

Mr. Mellin: I beg your pardon, that is Exhibit No. 8.

Q. Now those are all in black and white?

A. That is right.

Q. And no where would appear where the goods originated, is that so, the manufacturer?

A. As I mentioned before, it is not customary to do so. They are not our customers, they are our distributors' customers.

Q. I see. Did you hear counsel say yesterday in argument that one of the distinguishing signs of the Wed Lok trademark and the Feature Lock trademark was putting them on an angle to the horizontal and setting the word "lock" down from "Feature" such as I show you in these ads?

A. I don't quite get that, sir.

Q. Well, is that true or not?

A. I don't know what you just said.

(Testimony of Henry Peterson.)

Q. I beg your pardon. As I understood counsel yesterday, and I don't care to misquote you—at least——

Mr. Groner: I said that was the generality. There were [271] some exceptions, but that was the generality.

Mr. Mellin: I see. That the word "Feature" appeared on a slant and the word "lock" was on a slant and relatively offset as shown here—I mean the word "lock" is a little bit below the word "Feature." A. That is so.

Q. I mean, is that one of the distinguishing things between Feature Lock and Wed Lok?

A. No, there is——

Q. In appearance? A. There is——

Q. In appearance?

A. One of them. We try to make Feature Lock as far different from Wed Lok as possible. We didn't want to have any part of Wed Lok in any resemblance of name or anything.

Q. You hate them?

A. No, I don't hate anything. We have our own product which we feel is good enough to sell. We don't have to hide behind any other product in the country. Our reputation stands out as good as anyone's and we base our business on that. We don't have to follow anyone. People follow us.

Q. And that is the reason that you laid out the two words in that fashion, is to further distinguish——

A. Whatever we did at that time——

(Testimony of Henry Peterson.)

Q. Will you answer the question? [272]

A. I don't remember—we did everything we could——

Q. I didn't ask you if you did it for that purpose, Mr. Peterson, would you say that is one of the reasons they were set off that way, to distinguish that by itself? A. Yes.

Q. And you followed that practice rather consistently of putting those ads out in that fashion, didn't you? A. Right, sir.

Q. Now as a matter of fact, the ads—those mats that you produced here in court aren't the mats that you are currently using, isn't that so?

Mr. Groner: Well, they were put in evidence two months ago or three months ago, Mr. Mellin.

Mr. Mellin: You don't want the court to believe that those are the style in which "Feature Lock" is written today?

A. We have different styles. We have the script running this way, we have it in different ways. Another thing, some of our customers change our mats around a little bit after they get them.

Q. But they always get the cut of Feature Lock, the words "Feature Lock," do they not?

A. They do, unless they want to eliminate that and put their own names in, and I don't see any difference in the ads of Feature Lock in the ads you just gave me and the ones you are talking about. If you show me those ads you are talking about, you will [273] find that Feature Lock is written the same way.

(Testimony of Henry Peterson.)

Q. What ads are you talking about?

A. The ones you are talking about, the ones you showed me.

Q. I haven't shown you any ads, I showed you just mats.

A. Well, what mats did you show me?

Q. (Exhibiting to witness): Now go through those and tell me if in each instance there the word "Feature Lock" is not on two lines and at an angle.

A. In this particular series of mats they are all the same way.

Q. You heard counsel state that that was at least a distinguishing feature when he argued?

Mr. Groner: He certainly did. There is no question about that.

Q. (By Mr. Mellin): Now you don't want the court to believe that that is the way you are currently advertising? A. Court to believe what?

Q. That that is the way you always do this, with that distinguishing feature?

A. Not necessarily.

Q. And I show you the—if I can find out what paper this is—the Sunday Tacoma News Tribune, Sunday, January 2, 1949, and I ask you if that isn't one of your mats and it is written on one line? (Handing to witness.) A. That's right.

Q. And I show you the Sunday Oregonian for February 6, 1948. [275] Is that '48 or '49? I can't see it. It must be '49.

(Testimony of Henry Peterson.)

Mr. Groner: It is '49.

Q. (Continuing): ——for '49. And isn't that one of your rings and one of your Feature Lock ads? (Handing to witness.)

A. That is correct.

Q. And still a different mat, December 17, 1948, Feature Lock is also on the same, one line?

A. Yes.

Q. Now I show you the Punka City News for Friday, January 21, 1949, and I show you the Feature Lock with the word "lok." Does that occur occasionally with your customers?

A. When was this?

Q. You can see it on the paper—January or February of this year? I beg your pardon. If I remember correctly—what does it say up there? January 21, 1949.

A. Well, that is a mistake by our printer. That is all. I have no control of that.

Q. You have heard of other instances of your customers so advertising, haven't you?

A. Whenever I had one or two, and whenever I saw them, I immediately wrote them and told them to stop.

Q. And one was Zale's, in Texas?

A. That is correct. I immediately put a stop to it.

Q. Now I show you the Shawnee, Oklahoma News Star, Sunday, January 30, and Feature Lock is written in script there on one [275] line, isn't

(Testimony of Henry Peterson.)

that so, although on a slight slant? A. Yes.

Q. And I show you the Suffolk News Herald, January 30, 1949, another ad in which "Feature Lock" is prominently displayed in script on one line; isn't that correct?

A. That is correct.

Q. These are all your rings, of course?

A. Yes, they are all our rings.

Q. Then I show you the Lexington Herald for January 28, 1949, in a smaller mat of yours in which "Feature Lock" is on one line, is that correct? A. That's right.

Q. And I show you still a further picture of a Feature Ring mat of January something—January 23, 1949, I guess—in which Feature Lock is displayed on one line in script on the level?

A. That is correct.

* * *

Q. (By Mr. Mellin): We show you the Ontario, Oakland, California, [276] of February 16, 1949, "Feature Lock" is displayed in one line there with a still different mat, and then we will show you the Marshall, Texas, News Messenger for February 13, 1949, in which "Feature Lock" is still different, a still different mat, on which "Feature Lock" is at a slight slant but on one line. Now you have all of those various different mats, haven't you?

A. Yes, sir.

Q. But the only ones you produced were the ones that were on a slant and on two lines?

A. That is different——

(Testimony of Henry Peterson.)

Mr. Grumet: That is primarily my fault. I thought at the time of the depositions, at the time they were taken, we put in what was completely representative, and I just didn't want to crowd the record. I haven't even asked him about any advertisements since that time. I had no idea what had been advertised.

Mr. Mellin: These were in January, some of these.

Mr. Grumet: I think this is making a mountain out of a molehill, but if there be faults, it is my fault and not Mr. Peterson's.

Mr. Mellin: May I offer these as plaintiff's next in order?

The Clerk: 888.

(News clippings referred to above were thereupon received in evidence and marked Plaintiff's Exhibit 888.)

The Witness: May I see a small ad, that small ad budget?

Mr. Grumet: I don't know what you mean. [357]

The Witness: That yellow book, a small one. I didn't think that we had to worry about all this.

Mr. Grumet: May I be excused for a moment?

The Court: Yes.

Q (By Mr. Mellin): Now——

Mr. Grumet: Wait just a moment, please.

Mr. Mellin: Oh, I beg your pardon, counsel.

Mr. Grumet: Is that what you meant?

(Testimony of Henry Peterson.)

The Witness: Yes. May I see that, please?

(Exhibits handed to witness by Mr. Groner.)

The Witness: Mr. Mellin, if I may, your Honor? We entered those Feature Lock ads in our mats on the straight line right here (indicating). We didn't hide the fact. I didn't think it was necessary to hide it.

Mr. Mellin: Well, counsel made a point of it yesterday, and you only introduced the ones that were on two lines.

The Witness: We have them on every mat in this book. [278]

Mr. Mellin: Well, we just wanted all the facts, that is all.

Q. Now, with respect to these letters, you have identified the one of Mr. Jack Farrar, to Mr. Jack Farrar by Mellin & Hanscom, which I would like to read to you:

" . . . has called our attention to the fact that you are advertising a combination wedding ring and engagement ring under the trade-mark 'Dovetail Lock'."

Then I will read a letter from the Bastheim Company. Now, that is your dealer, isn't it?

A. That's right.

Q. This is to the Feature Ring Company, Inc., 126 West 46th Street, New York City, New York:

"We are enclosing herewith a copy of a letter we have received from Jack Farrar, Inc. at 122 South K Street, Tulare, California, together with a copy

(Testimony of Henry Peterson.)

of a letter which they received from Mellin & Hanscom, attorneys for Granat Bros.

As our customer is quite concerned, we would appreciate it very much if you would write and tell them that you will protect them in Feature Lock advertising. If they do not receive this assurance, we feel sure that they will not purchase any more Feature Lock rings.

Will you please send us a copy of the letter you [279] write to them.

Thanking you, we remain, with kindest regards,

Very truly yours,
E. BASTHEIM COMPANY."

Now, as a matter of fact, your dealer was confused as to who manufactured Dovetail Lock, because as a matter of fact, Dovetail Lock is not of your manufacture, isn't that so?

A. That is correct.

Mr. Mellin: Do you want me to prove it?

Mr. Groner: No, not at all. I just suggest that you read the next letter, which I think quite clearly explains that.

Mr. Mellin: The only point I am making here is that the dealer, that here is a dealer that asked him for protection from Dovetail Lock, showing that because of the word "Lock" there can be confusion.

Mr. Groner: May it please your Honor, I don't like to have only half a story. We put these things

(Testimony of Henry Peterson.)

in without reading them in order to save time. Now, right there in the file is a complete explanation of the thing.

Mr. Mellin: Well, I will read it all, then.

Mr. Groner: I think that is very nice.

Mr. Mellin (reading):

"Enclosed is a copy of a letter we just received from Mellin & Hanscom."——

This is from Farrar to Bastheim Company.

"It seems to me that this is going to eventually involve you and the manufacturers of the 'Feature Lock'. Fortunately we haven't ran any advertisement in the local newspapers yet on the 'Feature Lock' ring sets, but we did run an ad on the 'Dovetail Lock'.

Will you please advise us as to what action you are going to take on the matter."

Then it goes on:

"We are in receipt of your special delivery letter about the 'Feature Lock'.

As per your request we are enclosing the original letter received from Mellin & Hanscom, who are representing Granat Bros.

We would appreciate it, however, if you would in no way involve us in any way or in any lawsuit. We have satisfied Granat Bros. by informing them we would not advertise Feature Lock any more."

Q. And they never had advertised Feature Lock prior to that time, had they, according to their own

(Testimony of Henry Peterson.)

letter? But they had advertised Dovetail Lock, isn't that a fact? A. Would you like to——

Q. Well, let's answer my question first, and then you can make the explanation.

A. Beg pardon?

Q. Now, to start off, were they only—they had only advertised [281] Dovetail Lock, isn't that correct? A. That is correct, yes.

Q. And they received a letter from Mellin & Hanscom, and they immediately sent it to Bastheim Company, sent it to you through them. Then they wrote to Mellin & Hanscom, and you were advised that they were discontinuing the Dovetail Lock advertisement, they had one ring? A. Right.

Q. Then they wrote before they had advertised Feature Lock and said this: "We would appreciate it, however, if you would in no way involve us in any way or in any lawsuit. We have satisfied Granat Bros. by informing them we would not advertise Feature Lock any more."

And they hadn't advertised yet, according to this letter?

A. That is correct. You scared them off from using Feature Lock rings, exactly, and that is what you have done to a lot of my customers throughout the country.

Q. Which ones?

A. Oh, gosh, there is so many of them. I don't have all the records here.

Q. Now, as a matter of fact, in all these letters

(Testimony of Henry Peterson.)

you have here from these dealers, they still advertise Feature Locks, don't they?

A. Because I have sworn to give them protection. That is the only way I could have existed in business. Without that letter [282] of protection I had to go out of business, actually.

Q. Now, as a matter of fact, most of these dealers didn't pertain to Feature Locks, isn't that so? They pertained to, let's say, one of the other locks that were hatched from this Feature Lock commencement, let's say, invisible Lock, isn't that so?

A. Those letters were hatched from Feature Lock, and all the other locks that you wrote to which was my product.

Q. Under a different trade-mark?

A. Under a different trade-mark.

Q. And not identified as "Feature Lock"?

A. It was very clearly identified by the manner of advertising their product, and the type of merchandise. No one could mistake it was a Feature Ring product under a different brand name.

Q. Well, let's see. I will show you—let's see if you can tell me that the ordinary observer can find anywhere——

A. I am talking about distributors now, not retailers, not the man in the street.

Q. And not the retailers?

A. I am talking about distributors and retailers, not the consuming public.

Q. Now, when you talked about—by the way,

(Testimony of Henry Peterson.)

during your—you brought up another letter here from David Sarkin. I am going through these one by one so that there will be no mistake or misunderstanding here as to what actually happened. What trade-mark did he advertise your rings under?

A. Kin-Lock.

Q. And all of the products which he sold under "Kin-Lock" were Feature Ring products, weren't they, lock rings?

A. Feature Lock rings, supposedly.

Q. Now, in your testimony, when Mr. Groner took it in New York, you said this:

"Q. (By Mr. Groner): I hand you a photostat of the letter on the letterhead of Mellin & Hanscom, dated October 25, 1948, and addressed to David Sarkin, Inc. Have you any knowledge of that letter?

A. I have.

Q. How was it brought to your attention and when and by whom?

A. Mr. Sarkin himself called me and told me that he had received a letter from Mellin & Hanscom relative to the infringement on the trade-mark 'Wed Lok'. And I asked him whether he would send me a copy of that letter, and he was very much disturbed about it. In fact, he is one in particular who advertised Kin-Lock continuously until he got this letter, and he definitely stopped advertising in trade magazines.

Mr. Mellin: Advertise what?

Mr. Groner: Kin-Lock. [284]

(Testimony of Henry Peterson.)

Mr. Mellin: Is that your trade-mark, or his?

The Witness: That is his trade-mark, but our product, and our sales fell off consequently."

Now, was that a true statement?

A. That's right.

Q. And if those same questions were asked you today, what would you answer?

A. The same thing.

Q. Now, as a matter of fact, you know, don't you, that Mr. David Sarkin at no time stopped advertising Kin-Locks? You know that as a fact, and you knew it at that time, when you gave this deposition, isn't that so? A. No, I didn't.

Q. That was taken in January, wasn't it, that deposition? And it was noticed in October? He got the—he received his notice in October?

Mr. Groner: Well, refer to the record. Don't ask the witness.

Mr. Mellin: Well, I will refer to it, then.

Q. "I hand you a photostat of a letter dated October 25, 1948" and "He called you up about it, so the conversation with Mr. Sarkin must have taken place shortly after receiving the letter, after October 25, 1948."

That would be a true account, wouldn't it?

A. That is correct. [285]

Q. Now, I show you the National Jeweler for the issue of November of 1948 and I call your attention to a full-page ad on page 43 thereof, which

(Testimony of Henry Peterson.)

advertises Kin-Lock, isn't that so, by David Sarkin (handing to witness)?

A. That's right.

Q. Now, would you say that that was advertised? You would say that, wouldn't you?

A. May I see that, please?

Q. Yes, sir. You sort of refused it.

A. I am sorry. (Examining.)

If I may, your Honor? David Sarkin used to advertise interlocking sets, and he took a whole page. He doesn't show one interlocking set. He doesn't advertise Kin-Lock in big words as he did before. But in very, very small letters, the words appear at the bottom. Here he puts "Kin-Lock", but only after I pleaded with him to use some sort of advertising on it, not to drop it completely.

Q. (By Mr. Mellin): Now, that Kin-Lock advertisement appears by the same person on the page which I have marked there. Will you give me the page, please, and a full——

A. Page 43. Again, instead of a full page of Feature Locks, he has everything else but Feature Locks in there. Have you got an ad in Feature Lock advertising by him?

Q. If you will be patient, Mr. Peterson.

Now, I will show you the Jewelers' Circular Keystone for—[286] page 34—for December 1948, in which he advertises Kin-Lock. Isn't that so? It is marked there in red (handing to witness).

A. There again, your Honor, he has done the

(Testimony of Henry Peterson.)

same thing. Heretofore he used to have a whole page devoted to nothing but interlocking sets and showing nothing but our product.

Q. Well, all we complained of was the trademark "Kin-Lock". Is it a greater infringement, do you think, to make it large rather than to make it small?

A. Certainly this is not prominent enough—it is inconspicuous, due to your threatening letter.

Q. In other words, our letter scared them into reducing the size of type?

A. Not only the size of type, but it took away the entire ad.

Q. Now, you will notice all of these ads are consistent with their products. That was page 34 for Jewelers' Circular Keystone for December '48.

I offer the three pages just identified, and just those three pages, in evidence.

The Clerk: As one exhibit?

Mr. Mellin: May I withdraw that offer until I put them all in as one?

The Court: Very well.

Q. (By Mr. Mellin): Now, I show you Jewelers' Circular Keystone for November 1948, which must have gone to press before November 1. And their letter was received the latter part of [287] October, so it would have been too late to change his ad, wouldn't it?

A. I don't know. I have changed ads within two or three days.

(Testimony of Henry Peterson.)

Q. I see. Now, I call your attention to page 36 of that one. Isn't that the same ad we have been looking at, of Kin-Lock? A. That is correct.

Q. That is page 36 of the November issue of the Jewelers' Circular Keystone. Now, I will show you February of the Jewelers' Circular Keystone and ask you, what does that show (handing to witness)?

A. That shows that this is an interlocking set marked "Kin-Lock".

Q. In large letters or very small ones?

A. In fairly large letters, much larger than what you showed me a little while ago. [288]

Q. As a matter of fact, they are quite large, aren't they, and written in script, too?

A. I don't know how they are written, but they are much larger.

Q. He wasn't frightened any more?

A. When was this?

Q. February of this year.

A. Of this year—that's correct. We gave him further assurances, and he went ahead and continued to advertise.

Q. As a matter of fact, though, he never did discontinue advertising Kin Locks?

A. In this manner he did (indicating), in prominent parts of the ad he did.

Mr. Groner: May the record show that that advertisement came after the New York testimony to which my brother has adverted?

Mr. Mellin: That is page 34 of February 1949.

(Testimony of Henry Peterson.)

And here is one—did I have the November one in?

Q. That November issue of National Jeweler has also a full page ad by Mr. Sarkin, or David R. Sarkin, Inc. of Kin Lock advertisement; that is so (handing to witness)?

A. That is correct, that is right after you sent him the letters, that is right.

Q. It is still there?

A. I can see it.

Mr. Mellin: So I offer the pages which I have mentioned and which the witness has identified in the various publications in [289] evidence as Plaintiff's next in order, as one exhibit, your Honor.

The Court: Very well.

The Clerk: TTT.

(Pages of magazines referred to above of Feature Lock ads, were thereupon received in evidence and marked Plaintiff's Exhibit TTT.)

Q. (By Mr. Mellin): So therefore your testimony which you gave in January, that he definitely stopped advertising Kin Lock was incorrect, wasn't it?

Mr. Groner: May it please your Honor, I think the testimony has to be taken in its full context. Certainly the witness was speaking of using his product in association with the word "Kin Lock."

Q. (By Mr. Mellin): Now I will show you the letter and I would like to read it to you, and I ask

(Testimony of Henry Peterson.)

you if it has anything to do with your product or any particular kind of ring:

"Our client, Granat Bros., has called our attention to the fact that you are advertising a combination wedding and engagement ring under the trademark 'Kin Lock'.

"Our client feels that this use by you of the trademark 'Kin Lock' constitutes an infringement of our client's above trademark registrations, and also constitutes unfair competition in trade.

"We would appreciate it very much if you would [290] consider this matter and promptly advise us what position you will assume inasmuch as our client desires to avoid any unnecessary litigation."

That is Defendant's Exhibit 28.

Now that solely complains of the use of the trademark "Kin Lock", doesn't it, and nothing else?

A. That's right.

Q. Thank you.

A. Can I qualify that statement?

Q. Well, if it is in error in any way.

A. It is not in error, but I might say that most of the interlocking sets on the market were ours, and under all these different names you couldn't help but point all these different letters in my direction, to my customers.

Q. As a matter of fact, the majority of your rings are sold under trademarks other than "Feature Lock", aren't there, your locking rings?

(Testimony of Henry Peterson.)

A. I wouldn't say that.

Q. You don't know? You don't have the information that they are not, most of your dealers sell them under different names, don't they?

A. I don't have the information. I couldn't answer that intelligently.

Q. In fact, what you did was to sell your Feature Lock rings, and then based on that, they all came out with their own, by [291] that encouragement, they all came out with their own "lock" trademark, such as "Eterna Lock", "Love Lock", "Bridalok" and some others which I will show you later; all selling your products. And when you spoke of the newspaper advertisements, those were all collected for you because they advertised your products, isn't that so? A. That is correct.

Q. Now isn't it a fact that practically all of your dealers in Feature Lock rings adopted—that is, the major ones—a trademark other than "Feature Lock" for their product, but they used a "lock" on the end of it? Now I will point some out to you. What about this? Here is "David Sarkin". He is a distributor, isn't he? A. Yes.

Q. And he adopted "Kin Lock". When you said you didn't sell retail, to retailers, you didn't neglect to mention that you do so occasionally, to large chains such as Zale's?

Mr. Groner: The witness so testified, Mr. Mellin.

Mr. Mellin: I just want to clear it up.

A. To us they are distributors. Zale's have their own wholesale office in New York.

(Testimony of Henry Peterson.)

Q. I didn't understand that, not being a jeweler.

A. Chain stores are in the same category.

Q. Now one of your distributors was Dreyfuss of New York. They sold your products, didn't they? [292]

A. That's right, sir.

Q. And that is a large concern, isn't it?

A. Fairly large.

Q. And they adopted for your product the trade name or trade mark*ed* "Eterna Lock", isn't that correct? A. That's correct.

Q. And it is still being advertised today, isn't it?

A. I don't know. I don't think it is. There is a man that started out with a tremendous advertising campaign, and stopped, just because of your threatening letter, and he has lost thousands and thousands of dollars' worth of business, and consequently I have lost it.

Q. Now as a matter of fact—I will skip that for a moment, your Honor. Now then you also—now yesterday a very curious thing, at least curious to me, occurred. You said you were "thumbing" through these trademarks, and I was interested to know what your thumbing through—what it was that you were thumbing through.

A. It is the policy of Feature Ring Co.——

Mr. Groner: May it please your Honor, that is just a layman's expression for having a search made and having an opinion rendered on the search.

The Court: Yes.

(Testimony of Henry Peterson.)

Mr. Groner: Counsel, I think, knows that.

Mr. Mellin: No, I thought maybe you were thumbing through one of these alleged directories or something. [293]

The Witness: Directories?

Mr. Mellin: Well, something that is supposed to give you various jeweler's trademarks.

Q. You were thumbing through, then, the copies of registrations for wedding rings which might have the word "lock" in conjunction with it. And you said then, when you were—during your testimony—that you found at that time, which was before you manufactured Feature Lock—that is so? I mean Feature Lock interlocking rings, or whatever they are?

A. Not before we had the idea of coming out with them.

Q. Oh, I am not questioning that at all. I mean before that, before you had commercialized it?

A. Before we advertised it.

Q. And as I recall it, you said that you found two trademarks which were already used, or in use for locking rings and sets, and one of them was "Bridalok", is that correct?

A. I believe so, I am not sure.

Q. And the other one you said was "Love Lock", and the third one was "Wed Lok"?

A. I may have said that. I am not quite sure, but I think those are the names I saw.

Q. So that you are not—By the way, just to

(Testimony of Henry Peterson.)

clear that up, that Eterna Lock matter, I show you this, that as late as January 14, 1949, Friday, January 21, 1949, and July 25, 1948—I beg your pardon. Withdraw that. I thought it was '49. [294]

But it was in the Poughkeepsie New Yorker and the other one was the Adrian Daily Telegram, in Michigan, for January 14, January 21—these are advertising "Eterna Lock" (handing to witness)?

A. Is that Julius Dreyfuss' advertising?

Q. Well, they would be his customers, wouldn't they?

A. He may have had the mats sent to him months ago, before they withdrew their advertising campaign.

Mr. Groner: Don't deal in speculation. You don't know the answer?

The Witness: But certainly it is not the advertising of my customer.

Q. (By Mr. Mellin): Well, you have been so intermingling your customers with your distributors, all your customers, that I don't know the difference. You call Jack Farrar a customer, and he wasn't a customer. He was a "Dovetail Lock" customer, wasn't he?

A. He was a customer of my customer. All retailers are customers of my customers.

Q. Now I will take up that "Love Lock" and "Bridalok" when I can find your exact testimony.

Mr. Naylor: It is page 222, Mr. Mellin, if you want it.

(Testimony of Henry Peterson.)

Mr. Mellin: Thank you. I see it is almost that time.

Q. Now you said this:

"I felt that we would be too similar to what other people were using. Some were using 'Love Lock', some [295] were using 'Bridalok', and some were—there were Granat products which used 'Wed Lok'."

Now that was in the process of adopting your trade name "Feature Lock", which you had commercialized? A. Yes.

Q. Now as a matter of fact, those two trademarks weren't used in conjunction with locking rings until after you were selling your Feature Lock rings, and they were applied to Feature Lock rings, isn't that true? A. Love Lock?

Q. Love Lock and Bridalok.

A. They were applied to some of my rings after I came out with them, and they were also used with other products before I came out with them.

Q. Well, just to refresh your recollection, I will show you the Florence Morning News, Florence, S. C., for the Jewel Shop—and by the way, that was one of the letters that you have in here that were notified that "Bridalok" was an infringement of "Wed Lok", the same notice as we gave, and which you referred, which was referred to you for security of some sort. And that is dated August

(Testimony of Henry Peterson.)

21, 1948 (handing to witness). I ask you if those aren't your rings, displayed in that ad?

Mr. Groner: May I have the date?

The Witness: August 22, 1948.

A. They were, yes. They are. [296]

Q. And the trade-mark is "Bridalok" isn't it?

A. "Wedding bells"—"Wedding bells for miraculous Bridalok."

Q. And the "Bridalok" is prominently displayed in a trade-mark sense, isn't it?

A. Right. No, I beg to differ with you. The trade-mark is "Wedding Bells," and "Bridalok" is descriptive of the item.

Mr. Groner: Put the thing in evidence and let the court decide.

Q. (By Mr. Mellin): As a matter of fact, before "Bridalok" was the trade name, we complained of, and that was the trade name it was known as, isn't it?

A. There is another concern in New York who have the registration mark of "Bridalok," or use the name "Bridalok." They used it before we came out and some people didn't know they had access to that name, and they used it.

Q. As a matter of fact, the Jewel Box still uses it, don't they?

A. Possibly so. Maybe they have been given permission to use it. In fact, I think they were.

Q. You have got a good imagination.

Mr. Groner: Well, if it please your Honor——

(Testimony of Henry Peterson.)

A. I can bring you proof of that.

Q. I hand you up a page from the Fall River Herald News, Fall River, Mass., for July 15, 1948, and that is your mat in the lower lefthand corner, isn't it? A. That's correct. [297]

Q. And what is the trade-mark adopted there for your rings? A. Love Lock.

Mr. Groner: Maybe you should offer those.

The Witness: That is owned by another New York concern too, and was published before we came out with "Feature Lock."

(Whereupon a recess was taken until 2:00 o'clock p.m., the same date.) [297-a]

Afternoon Session—2:00 p.m.

HENRY PETERSON

resumed.

Cross-Examination
(Continued)

Mr. Mellin: At this time I would like to offer in evidence the tear sheets of the Florence Morning News, Florence, South Carolina, identified by the witness, showing "Bridal Set"; the Fall River, Massachusetts Herald for Thursday, July 15, 1948 advertising "Love-Lock." I should also like to offer in evidence the tear sheet of the Poughkeepsie New Yorker of Friday, July 1, 1948, and the tear sheet of the Adrian Daily Telegram of January 14, 1949

(Testimony of Henry Peterson.)

showing the trade-mark "Eterna Lock," as next in order.

(The tear sheets referred to were marked Plaintiff's Exhibit VVV.)

Q. (By Mr. Mellin): Now, as I understand it, your locking ring was sold by the trade and distributors under the name of "Feature Lock," "Eterna Lock," "Bridalok" — how about "Rhapsody Lock"? A. Yes, sir.

Q. And "Magnolia Lock"—— A. Yes, sir.

Q. And that is Friedmann's dealers?

A. I believe so.

Q. And the "Love-Lock" that we just called your attention to? [298] A. Yes, sir.

Q. Do you recall—and "Invisible Lock"?

A. Yes, sir.

Q. And "Kin-lock"? A. Yes, sir.

Q. Do you recall any others?

A. "Tru Lock."

Q. T-r-u L-o-c-k. That was Kay dealers?

A. Yes, sir.

Q. Any others? How about "Cupid Lock"?

A. The name may have been used on our merchandise, but I don't know—I mean, I haven't sold them to anybody that directly told me they were going to use that name. There may be other names, but at the moment I just can't think of any.

Q. Now, the letter from Joseph Gardner to Zale Jewelers, Defendants' Exhibit 19, that referred to

(Testimony of Henry Peterson.)

"Feature Lok," L-o-k, is that correct, complaining of "Feature Lok," L-o-k? You recall there was one advertisement from Zale's with that particular spelling?

A. Yes, there was one advertisement.

Q. Now, Zale's Jewelers then ceased to advertise Feature Lock rings, did they? A. They have.

Q. They have?

A. I believe so. I know they haven't purchased any more since [299] that time.

Q. I show you tear sheets of the Austin American, Austin, Texas, of October 5, with the Zale's ad of Feature Lock.

A. At that time they may have continued. It was slightly after.

Q. And October 5 is another Zale's Feature Lock?

A. They kept on advertising until they sold them all, and they wouldn't continue to buy any more, and then they stopped advertising.

Q. I see.

May I offer the ads in evidence?

Mr. Groner: You note that the "Lock" there is spelled in the correct way and the error of the first advertisement has been corrected?

Mr. Mellin: Let's not say I will stipulate the first is an error, but it has been corrected.

(The ads referred to were received in evidence and marked Plaintiff's Exhibit WWW.)

Q. (By Mr. Mellin): And the second one, which

(Testimony of Henry Peterson.)

is Defendants' Exhibit 20, dated July 16, 1948, that is for Feature Lock, to S. H. Friend, who is one of the defendants here? A. Yes, sir.

Q. And you recall this suit was brought shortly after, in August, I think, the first part of August 1948, within a couple of weeks. Now, the Morgan—how many distributors do you have [300] in San Francisco? A. About four, I think.

Q. And the S. H. Friend Company has ceased advertising Feature Lock because of the suit or this notification? A. I don't believe they have.

Q. In fact, you are certain?

A. I am pretty certain.

Q. Now, Morgan & Allen, which is Exhibit 21, have they ceased selling your ring?

A. They haven't ceased selling it, but their amount sold has been curtailed greatly.

Q. Well, the amount sold in all jewelry has to some degree in the last few months, due to economic conditions, reduced, hasn't it?

A. Not last year.

Q. Now, the Perel, Defendants' Exhibit 22, they haven't ceased advertising your Feature Lock ring, have they?

A. I don't know. I gave them the assurance that they would be protected if they did.

Q. Just so that you can be certain about it, Mr. Peterson, I show you tear sheet of September 30, 1948, and their name and the dealer's name on it.

A. This one ad in September?

(Testimony of Henry Peterson.)

Q. Yes. A. That doesn't mean very much.

Q. But it was there?

A. Yes, I expect it to be there.

Mr. Mellin: May I offer that tear sheet in evidence as the next in order.

(The tear sheet referred to was received in evidence and marked Plaintiff's Exhibit XXX.)

Q. (By Mr. Mellin): Now, how about D. C. Percival Company, Inc. of Boston, Massachusetts—that is Defendants' Exhibit 23 which you offered. They also use Feature Lock, and they haven't discontinued the sale or advertisement, is that correct?

A. I don't know. All I know is I gave them the assurance that if they would continue to sell them and advertise them we would protect them to the best of our ability.

Q. And they proceeded in accordance with that?

A. But their amount of orders and requests for them have fallen since that time. They haven't pushed them.

Q. Now, the Barrett-Davis letter which is Defendants' Exhibit 24, that refers not to Feature Lock, does it, but it refers to Invisible Lock?

A. That is correct.

Q. And there has since been a great deal of advertising of Invisible Lock in the newspapers?

A. There might be, sir.

Q. There is one in evidence, at least, that I put in. So that pertains to Invisible Lock. Now, the

(Testimony of Henry Peterson.)

Julius Dreyfuss one [302] was Eterna Lock, not Feature Lock, isn't that right?

A. That is right, sir.

Q. That is Exhibit 26. And Exhibit 27, calling attention to the letter of Mellin and Hanscom, that related not to Feature Lock but to Magnolia Lock?

A. That is correct.

Q. And to your knowledge have they discontinued advertisement of Magnolia Lock?

A. I don't know. The volume has fallen down considerably.

Q. And that is the situation you are in with a lot of other merchants. And with respect to Sarkin, Defendants' Exhibit 28, that was Kin-Lock, that wasn't Feature Lock? A. Kin-Lock, yes.

Q. As to the Defendants' Exhibit 29, Ed Kain & Company, do you know what they were sold under?

A. Feature Lock. That is the one that was canceled out because of your letter, is that correct?

Q. Let's say it was canceled, Mr. Peterson, according to the information we have. Now, then, in the taking of your deposition I asked you if you made a strenuous effort to locate any more of these —in your files any other like correspondence, and you told me that you had searched it very carefully, and these exhibits I have just been speaking of are all that you could locate. Is that still correct?

A. If there are any more, I don't know at this moment. [303]

(Testimony of Henry Peterson.)

Q. I see. Now, with respect to customer or newspaper advertising of Feature Lock, as I gathered from your statement this morning on direct you testified that the volume of tear sheets that you had were tremendous. A. That is right.

Q. And you said something with reference to about a million dollars.

A. I ventured a guess at it.

Q. That would be the cost of that advertising?

A. That is right.

Q. For what period did you place that?

A. Since the marketing of Feature Locks or merchandise that were sold under different names that were ours.

Q. Now, you were speaking of Feature Lock, is that correct?

A. Feature Lock and all other brand names under our merchandise.

Q. Which were advertising also under Feature Lock?

A. No, under different names, but our products.

Q. All right. Now, let's confine ourselves to Feature Lock. How much would you say was the dealers' advertising under that? I misunderstood you, Mr. Peterson. I am sorry. I thought you said there was a million dollars worth of dealer advertising under Feature Lock.

A. There might have been.

Q. For what months?

(Testimony of Henry Peterson.)

A. Since about March. Just Feature Locks alone, you are talking [304] about now?

Q. Yes.

A. I would say it came out in about May.

Mr. Groner: 1948?

The Witness: 1948.

Mr. Mellin: Yes.

Q. And what would you say the total dealer cost of advertising would be, say, to the end of January of 1949?

The Court: Feature Lock?

Mr. Mellin: Feature Lock.

A. To the end of January 1949?

Q. Yes. A. That is a very hard guess.

Q. Well, you guessed it a million dollars. Those figures are easy. Come on.

A. Well, if you had the file of tear sheets that I have, a guess of a million dollars—you would venture a guess of a million dollars very easily. Now, I didn't particularly separate them as to which were Feature Locks or which were Eterna Locks or which was someone else's lock; all I was interested in was selling our products, and our customers are entitled to use whatever name he chooses for it. If he wanted to use Feature Lock he could use Feature Lock.

Q. Now, as long as you are going to give a guess of a million dollars, I want you to guess how much was Feature Lock [305] advertisement during that period. You gave a million for the total. Would you say 50 per cent of that would be Feature Lock?

(Testimony of Henry Peterson.)

A. It might be.

Q. Would you think that was low or high?

A. That is a very tough question, Mr. Mellin.

Q. Would you say 5 per cent?

A. Oh, it is more than that.

Q. It would be more than 5?

A. I would venture a guess between 33⅓—around 33⅓ to 50 per cent.

Q. So that would be about $350,000?

A. To a half million if the grand total was one million.

Q. Well, now, let's leave the grand total out. Would you say that your estimates, your best estimate of Feature Lock newspaper advertising from May of 1948 to the end of January 1949 would be as much as a quarter of a million dollars or less?

A. That is very hard for me to answer.

Q. Well, how did you arrive at this guess of a million dollars? Let's use the same basis.

A. Well, I took all the tear sheets that I have got, piled them up on my desk, and as people would come in, people who knew more about advertising than I did, I asked them what certain ads cost in certain towns, they gave me an approximate idea, and many times we spoke about the gross total cost of those ads, and people who knew more than I did would say there was at least [306] a million dollars worth of advertising there, if not a whole lot more.

Q. Would you say that the Feature Lock ads would account for 25 per cent of those ads?

(Testimony of Henry Peterson.)

A. I would venture a guess at that as a bare minimum.

Q. As a bare minimum? A. Yes.

Q. So that would be a quarter of a million dollars?

A. If there were a million dollars worth total, yes.

Q. That is your estimate, there was a million dollars total? A. I guessed at that estimate.

Q. All right. Would you divide that more or less equally between the months——

Mr. Groner: If it please your Honor, that is speculative——

Mr. Mellin: I object to counsel——

The Witness: I am not a mathematician. I am not a mathematician. I am trying to do the best I can.

The Court: I think it is proper cross-examination. Go ahead.

A. I am trying to do the best I can with the mental picture at the moment. It gained momentum in the fall part of the year.

Q. (By Mr. Mellin): So it would be greater in the fall than it would be in the middle of the year?

Mr. Groner: He said fore part of the year.

Mr. Mellin: I thought he said "fall"—didn't you, f-a-l-l? [307] A. F-a-l-l.

Q. That is what I understood.

A. In the latter part of the year toward the Christmas season.

(Testimony of Henry Peterson.)

Q. It gained momentum?

A. It would gain momentum. In the beginning, when they naturally adjusted themselves as to how they would advertise, and as the thing progressed they did more of it.

Q. So we are all talking about the same thing. You would estimate that the total dealer advertising from the end of May to the end of January 1949 would be approximately a million dollars, and you estimate that the Feature Lock itself would be at least 25 per cent of that total; that would be your best estimate? Is that the basis that we are going on?

A. I think so. It is a pretty hard question for me to answer.

Q. And you think that would build up between the middle of the year or the fall and the Christmas season? A. Yes.

Q. Now, if I stated that the Feature Lock advertising in all of the newspapers in the United States, the cost of it in the month of September 1948 was $7800, would you say that was far wrong?

A. I wouldn't know.

Q. If I told you my information is that in October of 1948 the total cost of Feature Lock advertising in every paper of the United States was $8541, would you say that I was wrong? [308]

A. I wouldn't know. I don't know how you base your figures.

Q. And if I said that in the month of November

(Testimony of Henry Peterson.)

1948 that the total advertising in every newspaper in the United States, dealer advertising on Feature Lock, was $4,371, would you say I was in error?

A. I wouldn't know.

Q. And if I told you that in the month of December 1948 that the total cost of Feature Lock newspaper advertising by every dealer in the United States was $3,843, making a total for those months of $24,555, would you say that I was far wrong?

A. I wouldn't know.

Q. Now, that is less than 10 per cent of your estimate.

A. You have only given me a few months.

Q. All right. Now, in the month of January 1949 I will tell you that the cost of Feature Lock advertising in every paper in the United States by dealers was $3,281, so that the total figure for September, October, November and December 1948 and January 1949 was $27,836. Would you say that is a correct figure?

A. I would not say it is correct, no. How about June, July and August?

Q. I am just speaking about those particular months. Would you say that would be in line rather than the million dollar figure?

Mr. Groner: If your Honor please, the witness is not called [309] upon to answer a question like that. There is no foundation for it.

The Court: Well, he made an estimate or a guess. I think it is proper.

(Testimony of Henry Peterson.)

Q. (By Mr. Mellin): Now, then, you would say that your estimate of $250,000 for newspaper advertisement of Feature Lock would be much, much closer than, say, than $30,000?

A. I would say the overall advertising of my product——

Q. That is a million dollars.

A. ——is quite large, approximately a million dollars. I testified before that I didn't break it down to the individual names of my product. I just gathered all the tear sheets that came in, and I know there are a lot more I haven't got. You brought out some today. I never separated them. It is almost impossible for me to tell you what the correct figure would be for each name.

Q. Then your estimate of approximately $250,000 for that period in advertising of Feature Lock alone is just as good and just as close an estimate as you can make, and it is based in the same consideration that you based the overall one million dollar cost?

A. Not necessarily, Mr. Mellin, not necessarily.

Q. In other words, the million dollars—you just picked that out of the air, didn't you?

A. I wouldn't say I picked it out of the air. It may be more, [310] it may be less.

Q. Now, you testified yesterday—by the way—strike that, will you? By the way, you were here when counsel argued the motion for dismissal and made some reference to the Granat Bros. attempting

(Testimony of Henry Peterson.)

to monopolize the locking ring business; you heard him make some reference to that? You recall that?

A. I think so.

Q. Yes. Now, as a matter of fact, there are a considerable number of other locking rings on the market besides Feature Lock ring and Granat locking ring which are advertised under names which do not include the word "lock," isn't that so?

A. No.

Q. You say there are none?

A. I say there are other products with an interlocking feature that are advertised with the word "lock" in it.

Q. Well, let's answer the question my way: Aren't there a number of them advertised that have a trade-mark which does not include the word "lock"? A. Some.

Q. How many would you say? You are familiar with this whole business, aren't you?

A. Oh, yes.

Q. You keep close track of it?

A. Well, as close as I can. I am an individual, I am in my factory. I can't be all over at the same time. I give you my [311] best answer. There are some; how many, I don't know.

Q. And there are some quite successful ones, aren't there?

A. I wouldn't say. I wouldn't say there are any that are quite successful.

Q. None but Feature Lock

(Testimony of Henry Peterson.)

A. That is correct, sir; that is definitely correct.

Q. Now, in fact, your rings are sometimes advertised without the word "lock" in it and with a definite trade-mark, aren't they? A. They are.

Q. Isn't the distributor who is distributing them successful?

A. In his own particular branch of the industry, yes.

Q. He would be more successful if he had incorporated in the name, "lock"?

A. Not necessarily.

Q. I will show you the Salisbury Times of Salisbury, Maryland for Thursday evening, January 27, 1949, and I call your attention to the advertisement of Russell P. White, and I ask you if that is not a set of your locking rings.

A. That is a set of our locking rings.

Q. And the trade-mark is solely, "Rhapsody," isn't it?

A. "Rhapsody Rings with the locking feature."

Q. "With the locking feature" is an explanatory phrase below it, isn't it? A. That is correct.

Mr. Mellin: Has the Court seen it? (Exhibiting to Court.) [312]

Q. And I show you another locking set, or—pardon me. I will show you the tear sheet of the Concord Tribune of Concord, South Carolina of Sunday, January 16, 1949, and I call your attention to the ad in the lower left-hand corner and ask you if that is not a set of locking rings.

(Testimony of Henry Peterson.)

A. That is a set of locking rings.

Q. What is the trade-mark there?

A. "Together," but it isn't ours.

Q. I am not suggesting that, Mr. Peterson.

A. Oh, I am sorry.

Q. You are familiar with that? A. I am.

Q. Then I show you a tear sheet of the Morning Herald, Uniontown, Pennsylvania of Thursday, December 9, 1948, and ask you—I call your attention to a Hunt's ad and ask you if that is not a locking set and if it is your ring.

A. It is our rings.

Q. What is the trade-mark there?

A. "Bridal Set rings that won't shift or twist."

Q. In other words, it is also explanatory that they lock together, in the body of the advertisement?

A. I don't see the mention of the word "lock" in this particular ad.

Q. But it describes the same function. I show you the Charlestown, Illinois Daily—you are familiar with that ring, aren't [313] you, "Bridal Set"?

A. Yes, these are ours, yes, sir.

Q. And I show you the Charlestown, Illinois Daily Courier for September 24, 1948 and call your attention to an ad there of locking set of rings, and those are known by the name of Priscilla, aren't they? A. That is correct.

Q. And it describes below interlocking wedding and engagement rings? A. That is right.

Q. And I show you another ad of Sunday morn-

(Testimony of Henry Peterson.)

ing, February 6, 1949, and call your attention to the ad of the Stout Jewelry and ask you if that is not a set of locking rings as it says there?

A. That is right.

Q. And the trade-mark there is——

A. "Prism Lite," "Stay Right." [314]

Q. So then, as a matter of fact——

Mr. Mellin: May we offer these papers that I have just identified, as Plaintiff's next in order?

Mr. Groner: I have no objection to make, your Honor, but I would suggest that they are totally irrelevant.

The Clerk: YYY.

(Newspaper clippings referred to above were thereupon received in evidence and marked Plaintiff's Exhibit YYY.)

Q. (By Mr. Mellin): Then, as a matter of fact, Mr. Peterson, as far as you know there has been no attempt to disturb those by Granat Bros., or that the Granat Bros. have any exclusive or any partly exclusive possession of the locking ring field, is there?

A. I didn't get any letters of complaint from them, if that is what you mean.

Q. I guess I didn't hear you.

A. I didn't get any of your letters complaining of infringement from these people.

Q. No, I don't mean that, Mr. Peterson. I didn't think my question—I mean, there is no complaint

(Testimony of Henry Peterson.)

on your part, or no basis for a complaint on your part, that there was any attempted monopolization on the part of Granat Bros. of the locking ring field, such as counsel suggested in his argument yesterday?

A. I don't recall that argument yesterday, or my counsel's remarks, to be very honest with you.

Q. All right. Now, during your direct examination, Mr. Peterson, you testified that you did some research work or some development work or something in connection with locking rings for about six months prior to the time that you actually commenced to build them? A. Six years.

Q. Six years. I beg your pardon. I didn't intend to misstate that. A. Six years.

Q. And that would bring it back to 1942?

A. Yes, sir.

Q. And during that six year period, were you more or less constantly attempting to develop for commercial use this type of ring?

A. Not constantly—periodically.

Q. Well, you mean rather frequent, in frequent periods or recurrent?

A. Not frequent, infrequent.

Q. What would *be* the periods in between be?

A. Well, no specific time. It was just a case of when we had some free time in which to experiment.

Q. But I mean, it was sort of constantly with you, it was a goal to drive toward, to get this ring to put on the market during that period?

(Testimony of Henry Peterson.)

A. Yes, sir, it was a natural reaction—— [316]

Q. Now you also testified that during some portion of that period you used to meet with distributors in connection with the sales of your other products? A. That's right.

Q. And naturally, at those meetings you would discuss the ring business, wouldn't you?

A. Yes, sir.

Q. And during any of those meetings, did any of the distributors at any time, were there any conversations which came up with respect to Wed Lok?

A. Not of Wed Lok.

Q. Not of Wed Lok? A. No.

Q. At any time during that six year period, Mr. Peterson, did you make any attempt to see what was on the market with respect to locking rings, say, in 1947? A. Made no attempt.

Mr. Groner: The defendant wouldn't have found Wed Lok at that time, anyway, Mr. Mellin.

Mr. Mellin: Well then, you understand the English language a little differently than I do, Mr. Groner.

The Witness: We made no attempt at all.

Q. (By Mr. Mellin): You didn't even see what was on the market that might be in competition with the rings that you were coming out with? [317]

A. No.

Q. And up until——

A. I didn't know—excuse me. I didn't even know that Granat Bros. had an interlocking set.

(Testimony of Henry Peterson.)

Q. Up until three months before you came out with it? A. Several months before.

Q. That would be——

A. Six months, five, six, seven, eight months—I mean, around that time.

Q. Is this estimate just about as accurate as your estimate of a million dollars for retail advertisement in newspapers?

A. If I had the facilities that you have for checking figures, I would be more precise.

Q. I am going to let you be more precise before the day is over, Mr. Peterson.

A. All right. I am giving you to the best of my knowledge the figures that I would venture a guess at. It is not deliberate misinterpretation of any kind.

Q. I am not accusing you of that.

A. If I have made a mistake in my calculations, it has been honest.

Q. Now then, it is still your testimony that you had never heard of Wed Lok before the three months before—four, five, or six months—before May of 1948? A. Yes. [318]

Q. Now you said that there was a demand by the public for such a ring. That is, a locking ring. And that demand must have reached you through various distributors or various parties, over various parts of the country?

A. That is correct.

Q. And yet there was no—as a matter of fact,

(Testimony of Henry Peterson.)

wasn't there a demand for distributors and dealers who were unable to obtain, because of their exclusive dealer policy, Wed Lok rings?

A. No.

Q. And to your knowledge, that that is so?

A. No, that is not so. During the war they didn't have to have anything but diamond rings of any kind, because there was a shortage of them. And no matter what we made.

Q. I am talking about 1948.

A. '48—we were out with it by that time.

Q. You were out with it in May of '48?

A. We showed the progress of interlocking sets six years before that to our customers, who wanted to buy it then; but we didn't want to market it.

Q. Now, you know of your own knowledge, don't you, your knowledge of the business, that the Granat policy is only to select a certain few number of jewelry stores in each town to sell to?

A. I don't know what the Granat Bros.' policy is, or was.

Q. I mean, your distributor here, Mr. Friend —didn't he so inform you, that that has been the policy here in San Francisco [319] and in California?

A. No, there is no reason—I never asked him what the policy was.

Q. So you don't know that that was a fact during that period?

(Testimony of Henry Peterson.)

A. I didn't even ask him. It was of no material value to me. We have our own policies.

Q. Now isn't it a fact that distributors such as S. H. Friend, who couldn't handle the Wed Lok line—isn't it a fact that they wanted and came to you and said, "We have to get something to compete with Granat Bros. in this business?"

A. It is definitely not a fact, and I emphasize it.

Q. Now, during the taking of your deposition, you testified that it was in effect—I don't want to misquote you, but as I recall it, it was in effect —that you felt it was absolutely necessary to sell your product that you identify the lock part of it in the trademark? Did you testify to that, in substance, or am I in error?

A. I don't remember what I testified. Whatever I said there was the gospel truth. Whatever I said is the truth, and I say the same thing now. I don't change it.

Q. Well, let's get what your testimony is now. Is it necessary to sell your rings that you have the word "lock" in there?

A. I don't know what is necessary and what is not necessary.

Q. Now those ads I showed you use the term "Priscilla," for example, the trademark "Priscilla," and then it has underneath that, "These rings interlock"; isn't that sufficiently informative to your buying public that the rings interlock, without—— [320]

(Testimony of Henry Peterson.)

Mr. Groner: May it please your Honor, I suggest the entire irrelevance of that; merely because someone can sell without using a word doesn't indicate that another must abdicate the use of that word. I don't see any possible point in this line of questioning.

The Court: Overruled.

Mr. Mellin: I guess I only got a part of the question out. Would you read it, Mr. Reporter?

(Question read.)

Mr. Mellin (Continuing): ——without using the word "lock," such as in "Feature Lock," "True Lock," "Kin Lock," and so on?

A. Mr. Mellin, for years we have been selling rings known as "Feature Rings." For 15 years. We built a fine reputation on selling "Feature Rings" for that period of time, and when we came out with an interlocking set, to distinguish those from our regular merchandise we took the same name, "Feature," and we added the descriptive word "lock" to it, and called them "Feature Lock Rings" instead of "Feature Rings."

Q. As a matter of fact, no advertisement that has been put in evidence here shows any of the Feature Ring Co.'s rings except locking rings, isn't that correct?

A. That is correct. We never did any advertising before we came out with interlocking sets. It wasn't necessary.

(Testimony of Henry Peterson.)

Q. You never advertised Feature Rings as such?

A. It was never necessary. [321]

Q. Now, as I understand it, or correct me if I am in error, when you chose the name "Feature Lock," and selected it, you had seen the trademark "Wed Lok" at that time?

A. At the time we chose "Feature Lock," yes, sir.

Q. And you didn't think at that time that it could be conflicting?

A. I honestly did not.

Q. Now, by the way, you are in the jewelry business, you know; the J. R. Woods & Sons?

A. I do.

Q. And when you hear their trademark, which is "Art-Carve," you know that trademark, don't you? A. I do.

Q. And that means to you, "J. R. Woods & Sons"? A. Yes, it does.

Q. And "Orange Blossom" means what company?

A. Traub, I believe. I am not very familiar with that.

Q. Well, when you hear "Art-Carve," you know that is J. R. Woods? A. I do.

Q. And now when you hear "Wed Lok," you know that is Granat, isn't that so?

A. No, sir, you have not sold your merchandise under the name "Wed Lok," but "Art-Carve"

(Testimony of Henry Peterson.)

does. You only sell an interlocking set under that name.

Mr. Mellin: That is all.

Mr. Groner: No redirect. That is all.

(Witness excused.) [322]

LAWRENCE McCUNE

called on behalf of the defendant, sworn.

The Clerk: What is your full name, please?

A. Lawrence McCune, M-c-C-u-n-e.

Direct Examination

By Mr. Groner:

Q. Mr. McCune, you are an attorney at law?

A. I am.

Q. And you are general counsel for the firm of Morgan & Allen? A. I am.

Q. And you are also secretary of that company?

A. I am.

Q. And you are counsel for the Northern California Wholesale Jewelers' Association?

A. I am.

Q. Now I hand you a photostat of a letter, Defendant's Exhibit 21, addressed to Morgan & Allen on the letterhead of Mellin & Hanscom (handing to witness). Have you seen that before?

A. I have.

Q. Was it handed to you in the regular course of your duties as counsel for Morgan & Allen?

A. It was.

(Testimony of Lawrence McCune.)

Q. Did you respond to it? A. I did.

Q. Is that your response attached to the letter I have adverted [323] to?

A. Well, that is——

Q. Or a copy of it?

A. No, this is the original. The response to this letter was made by telephone to Mr. Mellin, and after a telephone conversation with him, I sent this letter to Feature Ring Co.

Q. I see. And that is the letter which you sent?

A. That is the letter.

Q. Now, as a result of the receipt of this letter by Morgan & Allen, did you advise them with respect to their future course of action?

A. I did.

Q. And would you mind stating—I assume there is no privilege claim here—would you mind stating the substance of your advice to them?

A. Well, I advised them not to do any further advertising until the matter was cleared up, as a matter of precaution.

Q. Now, as secretary of the Morgan & Allen firm, or as counsel for that concern, or as counsel for the Northern California Wholesale Jewelers' Association, do you have rather close contact with the jewelers hereabout?

A. Well, that is—I see the Wholesale Jewelers frequently.

Q. Have you in the course of the last year at any time acquired any knowledge of any confusion

(Testimony of Lawrence McCune.)

between the product of the defendant "Feature Lock" or the Feature Ring Co., known under [324] the name of "Feature Lock", and the product of plaintiff, known as "Wed Lok"?

A. I have not.

Mr. Groner: You may question the witness.

Mr. Mellin: No cross-examination.

(Witness excused.)

LEONARD BLOCH

called on behalf of the defendant, sworn.

The Clerk: What is your full name, please?

A. Leonard Bloch, B-l-o-c-h.

Direct Examination

By Mr. Naylor:

Q. Mr. Bloch, will you please state your full name, residence and occupation to the court?

A. Leonard Bloch, 657 Mission Street, San Francisco, partner and friend of S. H. Friend, wholesale jewelers.

Q. S. H. Friend is one of the defendants in this action, is it not? A. That's right.

Q. How long, Mr. Bloch, have you been in the jewelry business?

A. Since 1927, 21 years.

Q. Will you please give us a brief resume of your experience in the jewelry business in that period of time?

A. I left college in 1927 on my father's death to

(Testimony of Leonard Bloch.)

go into the retail store in Portland, Oregon. I remained there until 1936, [325] at which time I came to San Francisco to go to work for S. H. Friend.

Q. And are we to understand that you have been with S. H. Friend since your arrival here in 1936, since 1936? A. Since 1936, sir.

Q. What was the name of the store in Portland? A. Felix Bloch.

Q. And who was Felix Bloch?

A. My father.

Q. And do you have any personal knowledge of what period of time the retail establishment known as "Felix Bloch" was operated in Portland?

A. Felix Bloch was established in 1915. Before that it was Markson Bloch. My uncle started in Portland in '88, under the name of Dan Markson Co. My father joined him in about '08, and they were in partnership until '15, and then they split up and each one had his own store.

Q. Now what was the nature of your duties in the store in Portland?

A. Well, my father had passed away and I was brought in there to run the store with the help of a man who had been with us for quite a few years.

Q. That was a retail establishment?

A. That was a retail establishment.

(Testimony of Leonard Bloch.)

Q. Did you personally wait on customers in that store? A. Yes. [326]

Q. Did you do that rather constantly, or was it infrequent?

A. I was rather young then, and I waited on, at that time, most of the customers with the exception of the diamond customers, and at that time the diamond customers, we had a man who was very experienced and he handled a lot of the diamond customers at that time, so I handled some of them.

Q. Now what has been your experience in the jewelry trade since you came to work for S. H. Friend in San Francisco?

A. I have traveled on the road covering the six western states for the firm since my start with S. H. Friend in 1936. Up until the death of Mr. Friend, Sr., last May, that is. At that time I have spent, since then I have spent more time in the office than I have out on the road, though I have been out on two trips since his death.

Q. Now you spoke of covering the six western states. Will you explain that to the court? What do you mean by "cover"?

A. Well, we have accounts in quite a few of the towns, and I call on those accounts with the merchandise and we don't cover every city in every state, but quite a few of the cities in every state on the coast, including Idaho, Nevada and Utah.

Q. Now were the establishments you called on in

(Testimony of Leonard Bloch.)

that period of time the wholesale or retail establishments? A. All retail stores.

Q. And I assume your calls were made directly on the proprietors of those stores? [327]

A. 99 per cent of the cases. But in a few cases they did have buyers, but most of the stores, the owner was the buyer himself.

Q. By the way, in that period of time that you were traveling for S. H. Friend, what was its line of products that you were offering for sale?

A. Loose diamonds, diamond mounted rings, and mountings.

Q. By "mountings," you mean an unset ring?

A. An unset ring, yes, sir.

Q. Now in this period of time about which you have been speaking, have you become acquainted with Granat Bros.? A. Yes, sir.

Q. And for how long have you known of Granat Bros.?

A. I have known of Granat Bros. since I have been in the jewelry business, and that is 1927.

Q. Now have you heard at any time during the course of your experience of a product put out by them under the trademark "Wed Lok"?

A. Yes, sir.

Q. And for what period of time have you known of that mark?

A. From the year about 1937 or '38.

Q. That was your first knowledge of it?

A. I believe that's right, sir.

(Testimony of Leonard Bloch.)

Q. For what period of time did you observe that product being marketed, commencing at the date you gave?

A. Well, the word "Wed Lok" appeared in advertising, to my [328] knowledge, up until the war, and then it was not advertised to my knowledge during the war period at all. And then it came out again about 1946 or '47, sir.

Q. And you, of course, had knowledge of the fact since the resumption after the war?

A. Yes, sir.

Q. Now do you know of the defendant, Feature Ring Co.? A. Yes, sir.

Q. And how long have you known of that defendant?

A. We have done business with them for a period of about twelve years.

Q. And what can you say as to the reputation of the Feature Ring Co.?

A. We have always had a fine product from them.

Q. And you, of course, know Mr. Henry Peterson, connected with that firm? A. Yes.

Q. What can you say as to Mr. Henry Peterson's reputation?

A. We had Mr. Henry Peterson doing some work for us before he was with the Feature Ring Co., too, and it has always been absolutely tops.

Q. Has S. H. Friend purchased anything from Feature Ring Co.? A. Yes, sir.

(Testimony of Leonard Bloch.)

Q. When did they do that?

A. Well, approximately twelve years ago. I believe that is—[329] I haven't the exact—I wasn't in the office at that time, but we have been doing business with them for approximately twelve years.

Q. Do you know of a product sold by Feature Ring Co. under the trademark "Feature Lock"?

A. Yes.

Q. What is it?

A. It is a set of rings that lock together, produced by Feature Ring Co.

Q. When did you first learn of this article?

A. The salesman who showed me the article, I saw it in the early part of January, 1948.

Q. And has S. H. Friend purchased that article, so far, from Feature Ring Co.?

A. Yes, sir.

Q. When was it first purchased, according to your recollection?

A. At the same time that the article was shown me, and in January of '48.

Q. Has S. H. Friend sold this article to its customers? A. Yes, sir.

Q. Will you state to the court where that is sold, this product, speaking now of territory?

A. In the six states that we cover, and eight accounts.

Q. Did you personally have anything to do with the sale of the product marked "Feature Lock"?

A. Yes, sir. I took the original samples out

(Testimony of Leonard Bloch.)

and sold the product throughout the territory, myself.

Q. You exhibited the samples to the retail trade?

A. Yes, sir.

Q. In the territory worked by you?

A. That's right.

Q. Now in making such sales or exhibiting the samples to the trade, what did you tell the people about that product?

A. I told my customers that we had a locking ring unit that was the finest thing on the market, and that it was the best product that we had been able to find to put on to locking units.

Q. About how many accounts did you personally contact when you were traveling for S. H. Friend, exhibiting or displaying the Feature Lock Rings?

A. Approximately 200 to 250 accounts.

Q. In the several western states of which you spoke? A. That's right.

Q. To your personal knowledge, Mr. Bloch, are any of these accounts also Granat Bros. accounts?

A. Yes, sir.

Q. Could you name one of such?

A. Yes, sir, Burmeister & Anderson, in Oregon City; S. E. Needham, in Logan, Utah; Dunbar's in Yakima, Washington. Do you wish me to continue?

Q. That is sufficient. Have you continued to sell the Feature [331] Lock rings?

A. Yes, sir.

(Testimony of Leonard Bloch.)

Q. For S. H. Friend Co.? A. Yes, sir.

Q. What is S. H. Friend's policy with respect to advertising, Mr. Bloch?

A. Well, we only advertise in the local trade journal. We do no advertising for ultimate consumers purchasing. We never have, and our advertising is solely confined to the Pacific Goldsmith, which is the local trade journal.

Q. Had that been the continuous policy during the period of your connection with S. H. Friend?

A. That's right.

Q. Now, to your knowledge, has S. H. Friend advertised the Feature Lock ring in the Pacific Goldsmith? A. Yes, sir.

Q. I will show you a page from the June 1948 Pacific Goldsmith, page 64, and will ask if you can identify that as an ad of the S. H. Friend Co.?

A. Yes, sir.

Mr. Naylor: For continuity's sake, I would like to offer that as defendant's next, your Honor.

The Court: Defendant's 34.

(Page 64 from June 1948 Pacific Goldsmith was thereupon received in evidence and marked Defendant's Exhibit 34.) [332]

Q. (By Mr. Naylor): Now, during the period of your personal experience with Feature Lock, and your call on your trade and your sales to the trade, have you ever heard of any confusion by anyone between "Feature Lock" rings and the so-called "Wed Lok" rings of Granat Bros.?

(Testimony of Leonard Bloch.)

A. Absolutely none. There has never been a question of confusion brought to my attention in the two names whatsoever. I have never heard of it. I have never had a customer so inform me, nor have I seen that.

Q. Would you expect a customer to bring such an incident to your attention if it had occurred?

A. Very definitely.

Q. Why?

A. Well, if I overcharge them 25 cents, they sure write a letter and give us heck for that, and I am sure that they would on a deal like this. They write us all kinds of things.

Q. And yet you have never had any such report from a customer?

A. No. 90 per cent of our customers are personal friends of mine, and I hear from them on a lot of things besides business, and I am sure they would write me or tell me about any confusion that might exist.

Q. Can you recall a single instance where anyone related orally a so-called instance of confusion between the two brands?

A. I have never heard of an instance of confusion.

Q. And are you equally as positive concerning letter reports of [333] any such instances?

A. We have never had one in the office, and I believe I have seen all the correspondence that has come in.

(Testimony of Leonard Bloch.)

Q. Mr. Bloch, as one familiar with the trade and the usages of the trade, is there in your opinion any likelihood of confusion between the words "Wed Lok" and "Feature Lock"?

Mr. Mellin: I object, your Honor, on the ground that that is the Court's duty.

The Court: Sustained.

Q. (By Mr. Naylor): What do the words "Feature Lock" mean to you, Mr. Bloch?

A. The words "Feature Lock," to me, mean that it is a ring set and it locks, put out by Feature Ring Company.

Q. What does the word "Lock" mean to you when used in connection with the name of a ring?

A. The word "Lock" in connection with a ring would mean that ring set that actually locks together.

Q. In buying for resale do you and S. H. Friend make any difference and distinction between whether the article is die struck or cast?

A. No, sir.

Q. Is there a preference between these two methods of ring manufacture?

A. Oh, we prefer the casting because of the maneuverability, the innumerable designs that are possible to put out in casting [334] that are hardly feasible under the die-struck process.

Q. Has that been your experience for any appreciable period of time?

A. Well, it has been always, as far as my knowl-

(Testimony of Leonard Bloch.)

edge goes, when castings first came in, and if I remember right, a good casting came to the public, or the manufacturing process, in about 1938; and since that time, why, we have been using a lot of castings.

Q. Calling your attention again to Plaintiff's Exhibit 34, will you examine that and state whether or not the name of the manufacturer of that product appears upon it (handing to witness).

A. No, it does not.

Q. Is it the practice of S. H. Friend, when advertising a product handled by it, to include the name of the manufacturer in the advertisement?

A. We never do. We are selling our own name, and our customers are selling their own names. We never include the manufacturer's name on any product of ours.

Q. According to your personal observation, is that rather prevalent in the trade?

A. It is quite prevalent in the trade, especially in the diamond ring end of it. Most jewelers prefer to sell diamonds under their own name, because that is the reputation that has been built up in that particular town. Actually there has never been a successfully advertised national, nationally advertised [335] diamond ring. There are quite a few people, I would say three or four or five, who nationally advertise their ring, but no diamond ring has ever had the full public acceptance as has been found in the watch industry or the silver

(Testimony of Leonard Bloch.)

business, for example, or those ends of the jewelry business. It has been tried for many years, but no one has ever successfully put a real big diamond ring nationally known, a nationally known item, in the jewelry stores. The jewelers still prefer to sell the diamond rings under their own name, because that is their reputation in the local town.

Q. Now, what was your experience in that regard when you were in the retail store in Portland, Oregon?

A. We only sold diamonds under our own name; no other name was ever mentioned.

Q. Was the brand name, if there was a brand name, branded into the ring? Was a brand name mentioned to the ultimate purchaser?

A. No, sir.

Q. That has been your experience?

A. That has been my experience, yes, sir.

Q. What is the usual procedure, looking at it from the standpoint of the retail jewelry store clerk, when a person comes in to purchase rings of the type about which we are speaking here?

A. I don't think I understand the question.

Q. Well, assume that I am coming into a retail store and that [336] you are the clerk behind the counter. What is the clerk's approach to the problem?

A. Well, if they are asking for a diamond ring, which most of them do, you try and find out first

(Testimony of Leonard Bloch.)

in what price range they want it, and secondly, what particular style, whether wide or narrow. And you try to satisfy them from the stock that you have in your case.

Q. Now, that has been your experience?

A. Yes, sir.

Q. Now, in your experience, would you say that it was common practice in a transaction of that sort to mention to the ultimate retail purchaser the brand name of a manufacturer, assuming that you had rings in stock with the brand name upon them?

A. Well, no, it is not the general practice to mention that name.

Q. In view of what you have just stated, will you please state what purpose, in your experience, is served by having a brand name upon a ring, of the manufacturer?

A. Well, of a ring manufacturer? Well, if we are referring to a brand name, "Wed Lok" was a brand name in 1937 and '38 that I had heard about. At that time they did not have a locking unit on the market. At least—and I covered the West Coast sufficiently thoroughly to know—it was never marketed, if they had a locking unit. There was a fitting in their unit that was contoured, and the contoured set was, while it prevented the [337] ring from turning a little bit, it did not actually lock. It did not prevent the wedding ring from turning on the hand. At that time no one in the industry tried to put out a ring in

(Testimony of Leonard Bloch.)

competition to it. There was no rush of rings bearing the name "Lock" on them, because there was merely designation of a style, rather than a unit that would work. At the present time there is a demand for locking ring sets. The locking ring sets are a factor in the business, and retail customers called on us for locking sets. When the locking unit was shown us, we were interested in it.

Q. Now, what purpose, to you in the business of S. H. Friend, does a brand name upon a ring serve? What purpose is served by the appearance of the brand name? A. To us?

Q. Yes.

A. With the exception of "Feature Lock," nothing, none. There is no use of a brand name with the exception of "Feature Lock." We use the "Feature Lock" name as descriptive, because of the word "Lock," and "Lock" is the only word that in short will actually describe to the general public what the ring does.

Q. Now, since the receipt by S. H. Friend of a notice of infringement, and since the institution of this action, have you received any letters or any verbal cancellation of orders for Feature Lock rings?

A. Would you repeat that, please? Since what time? [338]

Mr. Naylor: Would you read that, Mr. Reporter?

(Question read.)

(Testimony of Leonard Bloch.)

A. Yes, sir, we have.

Q. Have there been one or more than one such instances?

A. There have been more than one.

Q. Have you produced here any communications from customers along that line?

A. Yes.

The Bailiff: The Court desires a short recess.

(Recess.) [338-A]

Q. (By Mr. Naylor): Just at recess, Mr. Bloch, you were exhibiting to me a letter from a customer. The letter is rather brief; I think, your Honor, it might be read right into the record. Will you state who it is from?

A. S. E. Needham, Jr., S. E. Needham Jewelers, Logan, Utah.

Q. Are you acquainted with those people?

A. Well, I have known them and done business with them for about thirteen years.

"S. H. Friend Co.
San Francisco, California.
Gentlemen:

"I received the Feature Lock merchandise, but we are afraid to advertise it because of the suit Granat instituted against you and another dealer. Have you any suggestions? How about changing name? What name, or would you assume all risk?

Yours,
S. E. Needham, Jr."

(Testimony of Leonard Bloch.)

Q. Is that letter dated, by the way, Mr. Bloch?

A. No, there isn't——

Q. Is there any notation on it by which we can fix the date as to when you received it?

A. Well, the merchandise was shipped most likely in the middle of—late May or early June, and I would judge it was sent sometime within a week or so after he had received the merchandise. I didn't notice the letter wasn't dated or I would have checked up [339] on when the invoice was sent to him, but it was most likely late May or early June when we made the shipment to him. It may have been late June.

Q. Was the letter brought to your personal attention? A. Yes, sir.

Q. What action, if any, was taken by S. H. Friend with respect to the contents of that letter?

A. I wrote them a letter and told them to go ahead and advertise under the name "Feature Lock" and that the Feature Ring Co. were backing us and would assume all risks.

Q. Now earlier in your testimony you spoke of the fact that there had been customers of yours, and by yours I mean S. H. Friend, who are also customers of Granat. A. Yes, sir.

Q. And I assume you sold ring sets to these customers? A. Yes, sir.

Q. What is your explanation as to why a single customer would be buying ring sets from you and buying Granat Bros.' products at the same time?

(Testimony of Leonard Bloch.)

A. Well, there are quite a few reasons for that. First of all, I think that the Feature Lock product is a better product. Secondly, Wed Lok only sold completed units to retail customers.

Q. Will you explain what you mean by completed units?

A. Yes. One part of the diamond business is selling diamond rings. There is another great part of the diamond business which [340] is selling mountings for remounting customers' rings, either remounting the small stones and the center stone in the rings or just remounting just the center stone in the rings. These blanks, so-called, were not available from the Granat Manufacturing Company's Wed Lok series, nor were the dealers, to my knowledge, allowed to buy the semi-mounted sets in which they could use their own set of diamonds that they had in stock.

Now a lot of the dealers like to move their own merchandise that they have in stock rather than to buy more stock at that time and put in complete sets.

In the first place, the unit of Feature Lock usually could be sold at—when Wed Lok first came out, the minimum retail set was in the neighborhood of $200. In Feature Lock we could give them a unit to sell completely mounted at $125.

We actually believed that the Feature Lock unit mounted with the same quality of diamonds as the Wed Lock units was sold at a less expensive figure

(Testimony of Leonard Bloch.)

than the Wed Lok, and the customers so thought.

Mr. Naylor: That is all.

Cross-Examination

By Mr. Mellin:

Q. Mr. Bloch, isn't it a fact that—we are talking now about ring quality—isn't it a fact that a hand tooled or *toll* made ring is usually about twice as expensive as a cast ring?

A. That depends entirely on what the ultimate production, in [341] my opinion——

Q. I mean, let's take——

Mr. Groner: Let the witness finish.

Mr. Mellin: I didn't know he was not finished.

A. Well, the original dies are expensive to make on die cut rings. If you can get sufficient distribution of any given pattern, then the cost per unit would go down. A fine casting, in my opinion, is equal to fine die stuff.

Q. But in the really finer rings, they are usually hand tooled, aren't they?

A. I would say that is the exception to the rule that they were hand tooled.

Q. Now you said that you had about—by the way, in this letter that you have been reading into the record—did you offer it in evidence?

Mr. Naylor: No, I didn't.

Mr. Mellin: Oh, I beg your pardon.

Q. ——that you were referring to, did they actually cancel the order? A. No, sir.

(Testimony of Leonard Bloch.)

Q. So you lost no business? A. No, sir.

Q. Is this the only letter that you could find of like import?

A. Yes, sir, that is the only letter I could find of like import. Most of the customers when I originally showed them the item, [342] I told them that if there was any question that we would back up—that the Feature Ring Co. would back them up.

Q. In other words, you anticipated that there would be trademark litigation? A. Yes.

Q. Now——

A. May I explain that?

Q. Why certainly.

A. Surely. Granat Bros. have been in several court appearances for various reasons over a period of years. They have had various confusions with other manufacturers, and I had no desire to in any way conflict without first being assured.

Q. And now you mean by that—do you have any particular suits in mind, Mr. Bloch?

A. In what respect?

Q. You say they were involved in various suits. You mean litigation?

A. They had a dispute with Albert Samuels Co.

Q. A local jeweler? A. Yes, sir.

Q. Who else?

A. Well, recently they had a question of one with Gomez.

Q. That was a patent suit?

A. That was a patent suit.

(Testimony of Leonard Bloch.)

Q. And you know, of course, that Gomez was held to be an infringer [343] in this court?

A. Yes, sir.

Q. And those are the two you had in mind when you said "various"?

A. No, sir, there was one, but I——

Q. There was one in 1928?

A. I think there was, which I have forgotten the name of.

Q. Those are the various suits. Now you say that you called on 200 to 250 retailers?

A. That is right.

Q. Now you know, and I think you testified that the Granat Bros. select the jewelers who handle Granat's products in various towns, is that correct?

A. No, sir.

Q. Is it a fact, then——

A. Is what a fact, sir?

Q. That they sell to only a certain number of jewelers in a town?

A. In certain towns, yes. In other towns, no.

Q. How many jewelers in any one town have you ever seen handling Wed Lok?

A. I would say up to three.

Q. And that would be in San Jose?

A. I had reference to San Jose—but I had reference to rather smaller towns, but San Jose might be one.

Q. That would be up to three dealers in a town which handle [344] Feature Lock, and in San Jose there were probably 30 to 35 jewelers?

(Testimony of Leonard Bloch.)

A. No, sir.

Q. Retail jewelers? A. No, sir.

Q. How many would you say?

A. Possibly two or three.

Q. Only two or three retail jewelers in San Jose? A. That is right.

Q. You mean that would be handling Wed Lok?

A. That is right.

Q. The question was, how many retail jewelers are there in San Jose? You didn't understand me, I am sorry. Probably 30 to 35?

A. Probably 30 to 35.

Q. So that Granat Bros. to your knowledge would only sell the three and not the other 32 or 33?

A. That is my understanding.

Q. Now you call on the other 32 or 33?

A. Not of necessity. I may call on the two or three that also sell theirs.

Q. Now out of these 250 customers did you have a list of how many of those that actually purchased Wed Lok rings?

A. I never made an actual list, but I judge between a hundred—Feature Lock rings, you say?

Q. Yes. [345] A. Between 125 to 150.

Q. That would be throughout your whole territory? A. That is right.

Q. And it is true, is it not, that in the cases of the smaller towns, they would buy one mounting, isn't that so? A. No, no, that is not so.

Q. What is the fact?

(Testimony of Leonard Bloch.)

A. I would say that the average unit sold was somewhere between, I would say, an average of about four to five.

Q. Four to five? A. Four to five units.

Q. And what do you sell them to the jewelers for?

A. I don't understand you.

Q. I mean, what do you sell the units to them for?

A. You mean in money?

Q. In blanks, yes. What do you sell a set of findings for?

A. We sell a set of findings for approximately $19 or $20, but I don't—I don't quite see—we sell very few blanks. The average unit sale was somewhere in the neighborhood of $400.

Q. The average unit sale was $400?

A. Yes, somewhere around there, yes, sir.

Q. And in some of those rings they sold for $90?

A. Some of those rings were sold for as high as $125 and some as low as $60 or $50.

Mr. Groner: I am confused. May I have that last answer [346] read back?

The Court: Yes.

(The reporter read as follows:

"A. We sell a set of findings for approximately $19 or $20, but I don't—I don't quite see—we sell very few blanks. The average unit sale was somewhere in the neighborhood of $400.

"Q. The average unit sale was $400?

"A. Yes, somewhere around there, yes, sir.

"Q. And in some of those rings they sold for $90?

(Testimony of Leonard Bloch.)

"A. Some of those rings were sold for as high as $125 and some as low as $60 or $50.")

Q. (By Mr. Mellin): By unit you mean a unit sale to a jewelry store? A. That is right.

Mr. Groner: May I ask what the $400 was?

Mr. Mellin: A unit sale. That is how much he would give him in an order.

Mr. Groner: Oh, I see, for two or three sets?

A. The average orders are two or three or four or five or six sets, the average would run around $400 for any particular customer. Some ran higher, some less.

Mr. Groner: I thought you meant that $400 was a price per set.

Q. (By Mr. Mellin): As a matter of fact, Mr. Bloch, your concern [347] couldn't handle Granat rings for love or money, could they?

A. I don't think we would want them.

Q. I mean, you cannot?

A. That I understand.

Q. You have always understood that?

A. We haven't tried to handle Granat rings. We have no reason to handle Granat rings.

Q. You know, of course, from your dealings with Granat, that Granat is very jealous even of its self-assumed reputation?

A. I wouldn't say that Granat were jealous of their reputation.

Mr. Mellin: That is all.

Mr. Naylor: No redirect.

(Testimony of Leonard Bloch.)

Mr. Mellin: By the way, may I have him for one or two questions? I forgot one thing. Would you mind, Mr. Bloch?

Q. If a retail jeweler was handling Keepsake rings, don't you think you would make that fact known to his customers?

Mr. Naylor: May I have that question read?

Mr. Mellin: If a retail jeweler were handling Keepsake rings, wouldn't he be quite proud to make that fact known to his customer that was a prospective customer?

A. No. There is only—your Honor, may I explain that this way—I mean I don't wish to put any manufacturer's name in jeopardy or anything. You have Keepsake, I don't. In my opinion, from selling on the road, the only reason any jeweler ever bought Keepsake was to get the free advertising, the free displays and [348] the free boxes that were given with them.

Q. That is right, they would sell Keepsakes because the public knows of Keepsake in his advertising?

A. No; the small jeweler cannot afford to put out mats, cannot afford to put out fancy window displays, cannot afford fancy boxes, so he buys rings that he certainly must know are over-priced, but he doesn't feel badly, because he gets all the rest of the merchandise free, he doesn't have to pay for it, and that is the only reason a jeweler sells Keepsakes.

(Testimony of Leonard Bloch.)

Q. How about "Art-Carve" by Wood?

A. "Art-Carve" is a good product.

Q. When you hear the words "Art-Carve," do you think of Woods, J. R. Woods?

A. That is right.

Q. And when you hear "Orange Blossom," you think of Traub? A. That is right.

Q. They are nationally advertised rings, aren't they? A. That is right.

Q. And they have been tremendously successful, haven't they?

A. What is "tremendously successful"?

Q. Well, they have been successful—I will take "tremendously" out.

A. It has been a successful operation.

Q. Over a long period of years?

A. Yes, sir. [349]

Q. So at least in this instance your dogmatic statement that there has been no successful ring advertising nationally would not apply, would it?

A. I still insist if you walked out on the street and asked the first ten people you met if they had ever heard of "Art-Carve" they wouldn't associate it with a diamond ring.

Q. Wouldn't associate it with rings at all?

A. One out of ten might associate it with rings; one out of ten. That is my opinion.

Q. And the word "Carve" in some degree is descriptive of those rings, isn't it? Some of them are hand tooled?

(Testimony of Leonard Bloch.)

A. I have never thought of that. I wouldn't know.

Mr. Mellin: I see. Thank you.

Mr. Groner: That is all.

Will you be sworn, please, Mr. Magoon?

ORRIN G. MAGOON

called on behalf of the defendant, sworn.

Direct Examination

By Mr. Groner:

Q. Where do you live, Mr. Magoon, and what is your occupation?

A. I live at 7364 Stockton Ave., El Cerrito, California; I am manager of W. R. Burke's jewelry store in Berkeley.

Q. How long have you been in the jewelry business? A. Going on 28 years. [350]

Q. And where have you been engaged in business during that period?

A. 23 years in San Francisco, five years in Berkeley.

Q. Are you acquainted with the parties to this litigation? A. I am.

Q. The plaintiff? A. Yes.

Q. And the defendants, or at least some of them?

A. That is right.

Q. Have you handled some of the products of the defendant Feature Ring Co.?

A. Very few.

(Testimony of Orrin G. Magoon.)

Q. In your 28 years' experience in the jewelry business, can you state what is the tendency of the retail jeweler in selling to the public and the tendency of the public in buying diamond rings, for example?

A. I might, yes, sir. In all my years in business we have sold our firm's, nobody's ring. I don't stress anybody's name at all.

Q. Do you think a trade name on an article such as a ring is valuable so far as the public is concerned?

Mr. Mellin: May I object to that, what he thinks I don't think is material here.

Mr. Groner: May it please your Honor——

The Court: Overruled.

A. I don't think it has any great bearing on the subject. It [351] hasn't, so far as I am concerned.

Q. In your experience have you ever acquired any knowledge of any nature indicating confusion between locking ring sets of the plaintiff Granat and of the defendant Feature Ring Co.?

A. No.

Mr. Groner: Witness with you, sir.

Mr. Mellin: No cross-examination.

Mr. Groner: Thank you, sir.

Mr. Naylor: If the court please, in winding up the defendants' record, there are certain documentary exhibits we should like to offer for the sake of completeness of the record. I have first here a certified copy of the abandoned application for

registration of trademark "Wed Lok," serial No. 352821, filed June 18, 1934, application having been made by Joseph Granat, no objection.

Mr. Naylor: Defendant's next, please.

(Abandoned application for "Wed Lok" registration, No. 352821, was thereupon received in evidence and marked Defendants' Exhibit No. 35.)

Mr. Naylor: Next I have a certified copy of the application which matured into registration No. 185365 of June 10, 1924, only application of Strauss & Strauss, which was the mark acquired by, or alleged to have been acquired by, plaintiff in this action.

Mr. Mellin: No objection. [352]

(Registration No. 185365 of June 10, 1924, was thereupon received in evidence and marked Defendants' Exhibit No. 36.)

Mr. Naylor: Specifically we have a list here or, rather, a booklet or folder of third party lock, l-o-c-k, and l-o-k registrations which were pleaded in defendants' answer in this proceeding, and those were marked for identification upon the San Francisco depositions. They haven't yet been offered. I should like to offer them at this time pursuant to the stipulation which permits the filing of printed copies as distinguished from certified copies. [353]

* * *

The Court: Well, you may offer them and I will reserve a ruling upon them.

Mr. Naylor: Now, may I amend, or rather add two additional ones to that which have come to our attention since the pleadings were drawn here? Unfortunately, we don't have extra copies of these.

Mr. Mellin: Yes, one is in '43 and one in '36. The same objection will lie to both of them.

Mr. Naylor: Defendants' next?

The Clerk: As one exhibit?

Mr. Naylor: Yes, one exhibit.

The Clerk: 37.

(Patent Office registrations were received in evidence and marked Defendants' Exhibit 37.)

Mr. Naylor: Reference has heretofore been made, your Honor, [361] to trade-marks, the book "Trade-Marks of Jewelry and Kindred Trades." We should like to have before your Honor specific references to pages within, which we have marked, wherein there appear under the several categories of jewelry marks which include "Lock" or "Lok."

Mr. Mellin: I object to that, your Honor, as being of no probative value. This certainly doesn't carry the presumptions that the patents do, that they were ever used. And certainly it doesn't show the date of use.

Mr. Naylor: We are offering it, Mr. Mellin, merely for the proposition that here is a manual published within the jewelry trade, used by the jewelry trade, within which——

Mr. Mellin: Well, this is in 1943.

Mr. Naylor: ——there is contained a plurality of marks, which include "Lock" and "Lok" in the jewelry trade. There again, we think it is proper for your Honor to have before him anything which, within the trade, indicates the practice of the trade with respect to this word "Lock" and "Lok," or anything, any other spelling of it.

Mr. Mellin: If your Honor please, this book is allegedly published in 1943. It carries no presumption that even the matter published in it is correct. It is purely hearsay from that point. There is no foundation laid that any of it was ever used or that the marks were ever used.

Mr. Naylor: You are not disputing that the book was [362] published, are you, Mr. Mellin?

Mr. Mellin: I can see it is in print. I think that——

The Court: I believe the objection is clearly good as to hearsay, no foundation for its reception. Sustained.

Mr. Naylor: May this be marked for identification, and may we submit authorities upon it?

The Court: Very well, you may do that if you care to.

Mr. Naylor: In that connection, for the purpose of the record, we would like to have the record show that certain of the marks appearing at the following pages have been marked: Page 2, page 22, page 32, page 106, 108, 112, 114, 134 and 140.

The Clerk: Defendant's 38 for Identification.

(Book entitled "Trade-Marks of Jewelry and Kindred Trades," with certain pages marked, was marked Defendants' Exhibit 38 for identification.)

Mr. Naylor: I understand it may be stipulated, your Honor, that the following publications contained a notice of the fact of the filing of this litigation, supplied by the plaintiff: The Jewelers' Outlook for August 1948, the National Jeweler for September 1948, and the Southern Jeweler for February 1949.

Finally, we have the New York depositions, taken on behalf of the plaintiff, and the several exhibits identified therein. We will offer those as defendants' next, if your Honor is willing.

Mr. Mellin: That is all with the exception of Mr. Peterson? [363]

Mr. Groner: It is perfectly agreeable to us that he be deleted. He has not been——

Mr. Mellin: Yes, that deposition of Mr. Peterson, the exhibits attached to his deposition, be deleted? Otherwise I have no objection.

Mr. Naylor: The final piece——

Mr. Mellin: Yes, apparently my associate didn't understand. That is all of Mr. Peterson's deposition, the oral testimony and the exhibits?

Mr. Groner: Surely; the whole thing goes out. All the exhibits actually have gone in during the last day anyway.

Mr. Mellin: In another form.

Mr. Groner: That is correct. So we have nothing but testimony, and that is entirely agreeable with us.

The Clerk: Defendants' No. 39.

(Depositions of Messrs. Beer, Stamper, Barnett and Ostrin referred to were received in evidence and marked Defendants' Exhibit 39.)

Mr. Naylor: We have, finally, the San Francisco depositions. What is your disposition with respect to those?

Mr. Mellin: You have the right to offer them.

Mr. Naylor: We will offer the discovery depositions, and their several component exhibits, as defendants' next in order.

The Court: Very well. [364]

Reporter's certificate attached.

[Endorsed]: Filed November 22, 1949.

[Endorsed]: 12407 and 12408. United States Court of Appeals for the Ninth Circuit. Samuel H. Friend, S. Herbert Friend, Leonard V. Bloch, copartners doing business under the firm name and style of S. H. Friend and Feature Ring Co., Inc., Appellants, vs. Granat Bros., a corporation, Appellee. Granat Bros., a corporation, Appellant, vs. Samuel H. Friend, S. Herbert Friend and Leonard V. Bloch, copartners doing business under the firm name and style of S. H. Friend and Feature Ring, Co., Inc., Appellees. Herbert Brown and Feature Ring Co., Appellants, vs. Granat Bros., a corporation, Appellee. Granat Bros., a corporation, Appellant, vs. Herbert Brown and Feature Ring Co., Inc., Appellees. Transcript of Record. Appeals from the United States District Court for the Northern District of California, Southern Division.

Filed November 22, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

No. 12407 – 12408

United States
Court of Appeals
for the Ninth Circuit.

SAMUEL H. FRIEND, S. HERBERT FRIEND, LEONARD V. BLOCK, Co-Partners, Doing Business Under the Firm Name and Style of S. H. Friend, and Feature Ring Co., Inc.,

Appellants,

vs.

GRANAT BROS., a Corporation,

Appellee.

GRANAT BROS., a Corporation,

Appellant,

vs.

SAMUEL H. FRIEND, S. HERBERT FRIEND and LEONARD V. BLOCK, Co-Partners, Doing Business Under the Firm Name and Style of S. H. Friend and Feature Ring Co., Inc.,

Appellees.

HERBERT BROWN and FEATURE RING CO.,

Appellants,

vs.

GRANAT BROS., a corporation,

Appellee.

GRANAT BROS., a corporation,

Appellant,

vs.

HERBERT BROWN and FEATURE RING CO., INC.,

Appellees.

Transcript of Record
IN FOUR VOLUMES

FILED
APR 5 1950
PAUL P. O'BRIEN, CLERK

Volume III
(Pages 415 to 723)

**Appeals from the United States District Court,
Northern District of California,
Southern Division.**

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

No. 12407 – 12408

United States
Court of Appeals
for the Ninth Circuit.

SAMUEL H. FRIEND, S. HERBERT FRIEND, LEONARD V. BLOCK, Co-Partners, Doing Business Under the Firm Name and Style of S. H. Friend, and Feature Ring Co., Inc.,

Appellants,

vs.

GRANAT BROS., a Corporation,

Appellee.

GRANAT BROS., a Corporation,

Appellant,

vs.

SAMUEL H. FRIEND, S. HERBERT FRIEND and LEONARD V. BLOCK, Co-Partners, Doing Business Under the Firm Name and Style of S. H. Friend and Feature Ring Co., Inc.,

Appellees.

HERBERT BROWN and FEATURE RING CO.,

Appellants,

vs.

GRANAT BROS., a corporation,

Appellee.

GRANAT BROS., a corporation,

Appellant,

vs.

HERBERT BROWN and FEATURE RING CO., INC.,

Appellees.

Transcript of Record
IN FOUR VOLUMES
Volume III
(Pages 415 to 723)

Appeals from the United States District Court, Northern District of California, Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

PLAINTIFF'S EXHIBIT J3

In the United States District Court, Northern District of California, Southern Division

Civil Action No. 28219-H

GRANAT BROS., a corporation,

Plaintiff,

vs.

SAMUEL H. FRIEND, S. HERBERT FRIEND and LEONARD V. BLOCK, copartners, doing business under the firm name and style of S. H. FRIEND,

Defendants,

and

FEATURE RING CO., INC.,

Intervening Defendant.

Civil Action No. 28220-H

GRANAT BROS., a corporation,

Plaintiff,

vs.

HERBERT BROWN, an individual,

Defendant,

and

FEATURE RING CO., INC.,

Intervening Defendant.

DEPOSITION OF MORITZ JACOBY

Taken in Behalf of the Plaintiff

Be It Remembered That, pursuant to the Notice

Plaintiff's Exhibit No. J3—(Continued)

of Taking Depositions hereto annexed and the further oral stipulation of counsel appearing in behalf of the respective parties hereinafter set forth, the deposition of Moritz Jacoby was taken in behalf of the plaintiff in the above-entitled actions on Monday, February 7, 1949, beginning at the hour of 10:30 o'clock a.m., at 529 Southwest Broadway, Portland, Oregon, before John S. Beckwith, a Notary Public for Oregon, residing at Portland, Multnomah County, Oregon.

Appearances:

MR. JACK E. HURSH,
Appearing for Messrs. Mellin and Hanscom,
391 Sutter Street,
San Francisco, California,
Attorneys for the Plaintiff.

MR. JAMES M. NAYLOR,
Russ Building,
San Francisco, California,
Appearing for John Vaughan Groner,
Of Attorneys for the Defendants.

(At said time and place the following stipulation was entered into between counsel present in behalf of the respective parties:)

It is stipulated and agreed, by and between the attorneys for the respective parties in the above-entitled actions, that the deposition of Moritz Jacoby may be taken on behalf of the plaintiff in the above-

Plaintiff's Exhibit No. J3—(Continued)

entitled actions, pursuant to the Notice of Taking Depositions hereto annexed, at 529 Southwest Broadway, Portland, Oregon, at the hour of 10:30 o'clock a.m., before John S. Beckwith, a Notary Public for Oregon, and in shorthand [2*] by the said John S. Beckwith.

It is further stipulated that said deposition, when fully transcribed, may be used on the trial of the actions above mentioned as by law provided; that all objections as to the form of the questions are waived unless made at the time the questions are asked, and that all objections as to the materiality, relevancy, and competency of the questions or answers are reserved to the parties until the time of trial.

It is further stipulated that the submission of the deposition, when fully transcribed, to the witness for examination and reading to or by him and opportunity to the witness to make any changes in form or substance and the signing of same by the witness are hereby expressly waived.

*** Page numbering appearing at top of page of original Reporter's Transcript.**

Plaintiff's Exhibit No. J3—(Continued)

MORITZ JACOBY

was thereupon produced as a witness in behalf of the plaintiff herein and, having been first duly sworn by the Notary, was examined and testified as follows:

Direct Examination

By Mr. Hursh:

Q. Mr. Jacoby, what is your name?

A. Moritz Jacoby.

Q. Where do you reside?

A. At Portland, Oregon.

Q. At what address? [3]

A. Envoy Apartments. I don't know the street number. I have only lived there twenty years.

Q. What is your occupation?

A. Retail jeweler.

Q. How long have you been in the jewelry business?

A. In the retail business or the length of time in the jewelry business?

Q. The length of time in the jewelry business?

A. Well, it would be about 43 years, the length of time in the jewelry business; in the retail business here in the city 39 years.

Q. Have you ever heard of a company by the name of Granat Bros.? A. Oh, sure.

Q. Do you know where they are located?

A. San Francisco.

Q. How long have you known of Granat Bros.?

A. As a concern or as individuals?

Plaintiff's Exhibit No. J3—(Continued)
(Deposition of Moritz Jacoby.)

Q. As a concern.

A. It must be around close to thirty years or longer. It is many years back.

Q. What type of merchandise does Granat Bros. manufacture and sell?

A. Well, they make the finest wedding rings and rings, diamond rings and other jewelry—the finest quality that is obtainable. [4]

Q. Have you ever heard of a wedding ring and engagement ring ensemble sold under the trade-mark "Wed-Lok"? A. Oh, yes.

Q. Who manufactures the Wed-Lok ring ensemble? A. Granat Bros.

Q. How long have you known of this ring ensemble that is sold under the trade name "Wed-Lok"? A. Oh, ten years or longer.

Q. When you hear of the word "Lock" either spelled L-o-k or L-o-c-k used in connection with wedding ring and engagement ring ensembles, with whose product do you associate it?

Mr. Naylor: Just a moment. Will you read that question?

(Last question read.)

Mr. Naylor: I will object to that question as being irrelevant and immaterial, as there is no claim advanced here for either the word L-o-c-k or L-o-k, and it is a question that pertains to an alleged mark that is not in issue.

Plaintiff's Exhibit No. J3—(Continued)
(Deposition of Moritz Jacoby.)

Mr. Hursh: Will you answer the question, Mr. Jacoby?

A. I think of Granat Bros., their product.

Q. Do you know the quality of the product sold by Granat Bros.?

A. Nothing but the finest thing that is made.

Q. Do you know what reputation Granat Bros. has in the Portland area?

A. Well, they have got such an excellent reputation that everybody in the city around here tries to get their line, and they [5] are envious of the fact that we have it.

Mr. Naylor: I object to the part of the answer that purports to recite what everybody wants as being purely hearsay.

The Witness: Oh, no; that is not hearsay.

Mr. Naylor: I move it be stricken.

Q. (By Mr. Hursh): Have other jewelers ever advised you that they would like to handle the Granat Bros. ring? A. Oh, yes.

Mr. Naylor: That is objected to as calling purely for hearsay.

Q. (By Mr. Hursh): Do you sell Granat Bros. products in your store?

A. Yes; about 99 per cent—90 per cent of our stock is things that they make.

Q. What type of product do you refer to?

A. Wedding rings, ensembles, diamond rings and ensembles, men's wedding rings—everything that they make.

Plaintiff's Exhibit No. J3—(Continued)

(Deposition of Moritz Jacoby.)

Q. What is the quality of this Granat Bros. merchandise that you sell?

A. Oh, it is nothing but the tops, the finest.

Q. Do you sell Wed-Lok ring ensembles?

A. Yes, lots of them.

Q. Do you advertise these Wed-Lok ring ensembles? A. Very extensively. [6]

Q. Just what type of advertising do you employ in advertising Wed-Lok ring ensembles?

A. Newspapers.

Q. Have you any of those advertisements here in your store? A. Yes.

Q. Could you produce them for me, please?

A. How far back do you want me to go?

Q. As early as you can.

A. We only have our records since 1947 in here.

Q. Mr. Jacoby, you have produced a book of advertising material showing newspaper ads. Was this book kept in the regular course of your business showing the various advertisements that you placed in the Portland newspapers? A. Yes, sure.

Q. I notice under each ad is a pencil notation stating the date and also in some instances the paper in which the ad appeared. Is that kept regularly in your business? A. Oh, yes.

Q. And this information appears under each of the ads in this book? A. Yes.

Q. I note an ad dated May 28, 1947, and the notation "Wed."—that is evidently the Wednesday Journal? A. Yes, Wednesday's Journal.

Plaintiff's Exhibit No. J3—(Continued)
(Deposition of Moritz Jacoby.)

Q. Do you know whether or not that ad appeared in the Wednesday [7] Journal of May 28th, 1947?

A. This is a copy from the paper. We took it out of the paper.

Q. The same ad appeared in the paper on that date? A. Yes.

Mr. Hursh: I ask that the reporter mark this as Exhibit 1.

(The advertisement referred to, dated May 28, 1947, was thereupon marked as Plaintiff's Exhibit 1, and a photostatic copy thereof is made a part of this deposition.)

Mr. Hursh: Is it stipulated that photostatic copies of these pages may be made and substituted for the originals?

Mr. Naylor: Yes. I suggest the whole page of the book be photostated so that the pencil notations will appear.

Mr. Hursh: Yes, we will do that in each instance.

The Witness: Here is one before that. That is May 25, 1947, over here.

Mr. Hursh: You point to an ad on the opposite page of this book that bears the notation "Sunday Oregonian, May 25, 1947." That ad was in the paper at that time on that date?

A. Correct.

Mr. Hursh: I ask that that be introduced as Exhibit 2.

Plaintiff's Exhibit No. J3—(Continued)
(Deposition of Moritz Jacoby.)

(The advertisement referred to, dated May 25, 1947, was thereupon marked as Plaintiff's Exhibit 2, and a photostatic copy thereof is made a part of this deposition.) [8]

Mr. Naylor: For clarification, in what paper did Exhibit 1 appear?

A. 1 was in the Journal. On the 28th was in the Journal and on the 25th was in the Oregonian.

Mr. Naylor: Thank you.

The Witness: Then we have another one here, June 1st.

Mr. Hursh: You point to another ad appearing in this book. It bears the notation, "Sunday Oregonian, June 1st, 1947." I ask that that advertisement be marked as Exhibit 3.

(The advertisement referred to, dated June 1st, 1947, was thereupon marked as Plaintiff's Exhibit 3, and a photostatic copy thereof is made a part of this deposition.)

The Witness: This is the Journal, June the 4th.

Mr. Hursh: You have produced another book, and in that book you have an advertisement advertising Wed-Lok wedding and engagement rings. This advertisement has a notation, "Wed. Journal, June 4, 1947." That is an ad that was run by your firm in the Journal of that date?

A. Oh, yes; correct.

Mr. Hursh: I ask that be marked as Exhibit 4.

Plaintiff's Exhibit No. J3—(Continued)
(Deposition of Moritz Jacoby.)

(The advertisement referred to, dated June 4, 1947, was thereupon marked as Plaintiff's Exhibit 4, and a photostatic copy thereof is made a part of this deposition.) [9]

Mr. Hursh: You have an ad that appeared—correct me if I am wrong, Mr. Jacoby—in the Sunday Oregonian, June 8th, 1947.

A. Yes, June 8th.

Mr. Hursh: We will mark that Exhibit 5 and introduce it in evidence as such.

(The advertisement referred to, dated June 8th, 1947, was thereupon marked as Plaintiff's Exhibit 5, and a photostatic copy thereof is made a part of this deposition.)

The Witness: Here is one in the Oregonian, June the 15th.

Mr. Hursh: We will mark that Exhibit 6.

(The advertisement referred to, dated June 15th, 1947, was thereupon marked as Plaintiff's Exhibit 6, and a photostatic copy thereof is made a part of this deposition.)

The Witness: There are two of them here, on June the 29th and on July—that was the Sunday Oregonian, June the 29th, '47, and we have July 2nd, 1947, on a Wednesday in the Oregon Journal.

Mr. Hursh: We will mark those two ads as one exhibit, and that will be Exhibit 7.

Plaintiff's Exhibit No. J3—(Continued)
(Deposition of Moritz Jacoby.)

(The advertisements referred to, dated June 29th and July 2nd, 1947, respectively, were thereupon marked as Plaintiff's Exhibit 7, and a photostatic copy [10] thereof is made a part of this deposition.)

Mr. Hursh: We will introduce that in evidence as Exhibit 7. What is the next ad that appears?

A. July the 20th, Sunday, July the 20th, in the Oregonian. This is all 1947.

Mr. Hursh: We will introduce that in evidence as Exhibit 8.

(The advertisement referred to, dated July 20th, 1947, was thereupon marked as Plaintiff's Exhibit 8, and a photostatic copy thereof is made a part of this deposition.)

The Witness: There are two more over here: Wednesday Journal, July 23rd, and Sunday Oregonian, July 27th.

Mr. Hursh: Those are both in 1947, are they?

A. Yes.

Mr. Hursh: We will mark that full page as Exhibit 9 and introduce both of these advertisements.

(The advertisements referred to, dated July 23rd and July 27th, 1947, respectively, were

Plaintiff's Exhibit No. J3—(Continued)
(Deposition of Moritz Jacoby.)

thereupon marked as Plaintiff's Exhibit 9, and a photostatic copy thereof is made a part of this deposition.)

Mr. Naylor: That is in the Oregonian?

A. One is in the Journal and one in the Oregonian.

Mr. Naylor: Both the same date?

A. No, the Journal was on the 23rd of July and the Oregonian [11] was on the 27th of July.

Mr. Hursh: When did the next ads appear?

A. Well, we have got the Sunday Oregonian, August 3rd, and Wednesday's Journal, July 30th.

Q. Those are both in 1947? A. All 1947.

Mr. Hursh: I will mark that full page, including both of the ads, as Exhibit 10 and introduce it in evidence.

(The advertisements referred to, dated August 3rd and July 30th, 1947, respectively, were thereupon marked as Plaintiff's Exhibit 10, and a photostatic copy thereof is made a part of this deposition.)

The Witness: Then we have got the Sunday Oregonian, August 10th.

Mr. Hursh: We will mark that as Exhibit 11 and introduce it in evidence as Exhibit 11.

(The advertisement referred to, dated August 10th, 1947, was thereupon marked as

Plaintiff's Exhibit No. J3—(Continued)
(Deposition of Moritz Jacoby.)

Plaintiff's Exhibit 11, and a photostatic copy thereof is made a part of this deposition.)

The Witness: We have got the Sunday Oregonian, August the 24th, 1947.

Mr. Hursh: We will introduce that advertisement as Exhibit 12.

(The advertisement referred to, dated August 24th, 1947, [12] was thereupon marked as Plaintiff's Exhibit 12, and a photostatic copy thereof is made a part of this deposition.)

The Witness: Here is one here. This is the Sunday Oregonian, September the 14th.

Q. 1947? A. Yes, all '47.

Mr. Hursh: We will mark that Exhibit 13 and introduce it in evidence.

(The advertisement referred to, dated September 14, 1947, was thereupon marked as Plaintiff's Exhibit 13, and a photostatic copy thereof is made a part of this deposition.)

The Witness: Wednesday's Journal, September 17th, 1947.

Mr. Hursh: We will mark that Exhibit 14 and introduce it in evidence as Exhibit 14.

(The advertisement referred to, dated September 17, 1947, was thereupon marked as Plaintiff's Exhibit 14, and a photostatic copy thereof is made a part of this deposition.)

Plaintiff's Exhibit No. J3—(Continued)
(Deposition of Moritz Jacoby.)

The Witness: The next one I have is the Sunday Oregonian, September 28th, 1947.

Mr. Hursh: We will introduce that as Exhibit 15.

(The advertisement referred to, dated September 28th, 1947, was thereupon marked as Plaintiff's Exhibit [13] 15, and a photostatic copy thereof is made a part of this deposition.)

The Witness: We have got another one over here. I hope they got them all in here. That is all, probably. October the 5th, the Sunday Oregonian, 1947.

Mr. Hursh: We will mark that Exhibit 16 and introduce it in evidence.

(The advertisement referred to, dated October 5th, 1947, was thereupon marked as Plaintiff's Exhibit 16, and a photostatic copy thereof is made a part of this deposition.)

The Witness: Here is one October 19th, Sunday.

Mr. Hursh: We will mark that Exhibit 17 and introduce it in evidence. That is October 19th, 1947? A. Yes.

(The advertisement referred to, dated October 19th, 1947, was thereupon marked as Plaintiff's Exhibit 17, and a photostatic copy thereof is made a part of this deposition.)

The Witness: Wednesday Journal, November 9th.

Plaintiff's Exhibit No. J3—(Continued)
(Deposition of Moritz Jacoby.)

Mr. Hursh: We will mark that Exhibit 18 and introduce it in evidence.

(The advertisement referred to, dated November 9th, 1947, was thereupon marked as Plaintiff's Exhibit 18, and a photostatic copy thereof is made a part [14] of this deposition.)

The Witness: January 4th, 1948.

Mr. Hursh: That will be marked Exhibit 19, and we will introduce it in evidence as Exhibit 19.

(The advertisement referred to, dated January 4, 1948, was thereupon marked as Plaintiff's Exhibit 19, and a photostatic copy thereof is made a part of this deposition.)

The Witness: There is two on one page here. The Sunday Oregonian, January 18th, and the Wednesday Journal. They call that the Oregon Journal. That is January the 14th.

Q. Those were in 1948?

A. Yes, that is in '48.

Mr. Hursh: We will mark that Exhibit 20 and introduce it in evidence.

(The advertisements referred to, dated January 18th and January 14th, 1948, were thereupon marked as Plaintiff's Exhibit 20, and a photostatic copy thereof is made a part of this deposition.)

The Witness: Here we have got January 28th

Plaintiff's Exhibit No. J3—(Continued)
(Deposition of Moritz Jacoby.)

in the Journal and we have got January 25th in the Sunday Oregonian—cut that out. Sunday the 25th, that is not one. Just this one on Wednesday, January 28th.

Mr. Hursh: We will introduce in evidence that one advertisement that appears—— [15]

The Witness: Pardon me just a minute. This is not one. The Wednesday Journal, the 28th, and the January 25th are not either one of them Wed-Loks. Excuse me.

Mr. Naylor: Will you state what they are advertising?

A. Pardon?

Mr. Naylor: Will you state what goods they are advertising?

A. Diamond rings, diamond ensembles.

Mr. Hursh: Of whose manufacture?

A. Granat Bros.

Mr. Naylor: Is there a name given to them?

A. The one in the Journal—the Journal hasn't any particular design name that we used. It has a design name but we didn't use it. They have a design name down there for it. The one that ran in the Sunday Oregonian on January 28th is under the heading of Threesomes, Minuet, Fantasy, and Georgian.

Mr. Hursh: What is the next ad appearing in this book, Mr. Jacoby?

A. That is the Sunday Oregonian, February 1st, 1948. This is a Wed-Lok ad.

Plaintiff's Exhibit No. J3—(Continued)
(Deposition of Moritz Jacoby.)

Mr. Hursh: We will mark that Exhibit 21 and introduce it in evidence.

(The advertisement referred to, dated February 1, 1948, was thereupon marked as Plaintiff's Exhibit 21, and a photostatic copy thereof is made a part of this deposition.) [16]

The Witness: We have got the Sunday Oregonian, February 15, '48. That is just a year ago.

Mr. Hursh: I will introduce that in evidence as Exhibit 22.

(The advertisement referred to, dated February 15, 1948, was thereupon marked as Plaintiff's Exhibit 22, and a photostatic copy thereof is made a part of this deposition.)

The Witness: Then we have got the Sunday Oregonian, February 22.

Mr. Hursh: We will introduce that as Exhibit 23.

(The advertisement referred to, dated February 22, 1948, was thereupon marked as Plaintiff's Exhibit 23, and a photostatic copy thereof is made a part of this deposition.)

The Witness: The Sunday Oregonian, March 14.

Mr. Hursh: We will introduce that in evidence as Exhibit 24.

(The advertisement referred to, dated March 14, 1948, was thereupon marked as Plaintiff's

Plaintiff's Exhibit No. J3—(Continued)
(Deposition of Moritz Jacoby.)

Exhibit 24, and a photostatic copy thereof is made a part of this deposition.)

The Witness: Here is one here, April 7th. That is in the Wednesday Journal, April the 7th.

Mr. Hursh: 1948? [17]

A. Yes, that is all '48.

Mr. Hursh: We will introduce that exhibit as Exhibit 25.

(The advertisement referred to, dated April 7, 1948, was thereupon marked as Plaintiff's Exhibit 25, and a photostatic copy thereof is made a part of this deposition.)

The Witness: Here is another one, the Sunday Oregonian, April the 18th.

Mr. Hursh: We will introduce that as Exhibit 26.

(The advertisement referred to, dated April 18, 1948, was thereupon marked as Plaintiff's Exhibit 26, and a photostatic copy thereof is made a part of this deposition.)

The Witness: We have got the Sunday Oregonian, April 25th.

Mr. Hursh: We will introduce that advertisement as Exhibit 27.

(The advertisement referred to, dated April 25, 1948, was thereupon marked as Plaintiff's Exhibit 27, and a photostatic copy thereof is made a part of this deposition.)

Plaintiff's Exhibit No. J3—(Continued)
(Deposition of Moritz Jacoby.)

The Witness: That is the Sunday Oregonian, May the 9th.

Mr. Hursh: We will introduce that as Exhibit 28.

(The advertisement referred to, dated May 9th, 1948, was thereupon marked as Plaintiff's Exhibit 28, and a photostatic copy thereof is made a part [18] of this deposition.)

The Witness: The Sunday Oregonian, June the 13th.

Mr. Hursh: That will be Exhibit 29. We will introduce that in evidence.

(The advertisement referred to, dated June 13th, 1948, was thereupon marked as Plaintiff's Exhibit 29, and a photostatic copy thereof is made a part of this deposition.)

The Witness: Here is another one, July 4th—Sunday, July 4th.

Mr. Hursh: We will introduce that as Exhibit 30.

(The advertisement referred to, dated July 4th, 1948, was thereupon marked as Plaintiff's Exhibit 30, and a photostatic copy thereof is made a part of this deposition.)

Mr. Naylor: Is that the Sunday Oregonian?

A. Yes, it is in the Oregonian. All our ads on Sundays are in the Oregonian and on week days are in the Journal. Now here is two of them: The

Plaintiff's Exhibit No. J3—(Continued)
(Deposition of Moritz Jacoby.)

Wednesday Journal, July 21st, and the Sunday Oregonian, July 25th.

Mr. Hursh: Both in 1948?

A. Right.

Mr. Hursh: We will introduce those as Exhibit 31.

(The advertisements referred to, dated July 21, and July 25, 1948, were thereupon marked as Plaintiff's [19] Exhibit 31, and a photostatic copy thereof is made a part of this deposition.)

The Witness: This is the Sunday Oregonian, August 21.

Mr. Hursh: That will be introduced as Exhibit 32.

(The advertisement referred to, dated August 21, 1948, was thereupon marked as Plaintiff's Exhibit 32, and a photostatic copy thereof is made a part of this deposition.)

Mr. Naylor: To which we object as being an advertisement of Wed-Lok after commencement of this action. It has no bearing on the issues of the case.

Mr. Hursh: Do you want to make that as a continuing objection, because I am going to introduce all of these ads?

Mr. Naylor: Let it be stipulated that we have a continuing objection to all advertisements purporting to have been inserted in any media after

Plaintiff's Exhibit No. J3—(Continued)
(Deposition of Moritz Jacoby.)

the date of the commencement of this action, August 3rd, 1948, as being immaterial to any issue.

Mr. Hursh: So stipulated.

The Witness: This one is the Sunday Oregonian, October the 10th.

Mr. Hursh: That will be Exhibit 33.

(The advertisement referred to, dated October 10th, 1948, was thereupon marked as Plaintiff's Exhibit 33, and a photostatic copy thereof is made a part of [20] this deposition.)

The Witness: This is the Wednesday Journal, October the 6th.

Mr. Hursh: We will introduce that as Exhibit 34.

(The advertisement referred to, dated October 6th, 1948, was thereupon marked as Plaintiff's Exhibit 34, and a photostatic copy thereof is made a part of this deposition.)

The Witness: This is Sunday, December the 26th, 1948.

Mr. Hursh: We will introduce that as Exhibit 35.

(The advertisement referred to, dated December 26, 1948, was thereupon marked as Plaintiff's Exhibit 35, and a photostatic copy thereof is made a part of this deposition.)

Mr. Naylor: What is the date of that?

A. December 26th.

Q. (By Mr. Hursh): 1948; is that correct?

Plaintiff's Exhibit No. J3—(Continued)
(Deposition of Moritz Jacoby.)

A. That is correct. This is January 19th. It is the Wednesday Journal. That was the first Wednesday, I believe, in January. They didn't write the date in on this. It is the Wednesday Journal, January 19th, 1949.

Mr. Hursh: That ad did actually appear in the Journal on January 19th, 1949? A. Oh, yes.

Mr. Hursh: We will introduce that as Exhibit 36.

(The advertisement referred to, dated January 19, 1949, was thereupon marked as Plaintiff's Exhibit 36, and a photostatic copy thereof is made a part of this deposition.)

The Witness: This is the Sunday Oregonian, January the 23rd.

Mr. Hursh: That will be introduced in evidence as Exhibit 37.

(The advertisement referred to, dated January 23rd, 1949, was thereupon marked as Plaintiff's Exhibit 37, and a photostatic copy thereof is made a part of this deposition.)

The Witness: That is all.

Q. (By Mr. Hursh): Mr. Jacoby, how long have you known of the trade-mark "Wed-Lok"?

A. Oh, ten years or longer.

Q. How long have you sold ring ensembles under the trade-mark "Wed-Lok"?

A. When they were first manufactured by Granat Bros. The exact date I could not give you,

Plaintiff's Exhibit No. J3—(Continued)
(Deposition of Moritz Jacoby.)

but I know it has been at least 10 years or longer.

Q. Do you have any records showing your purchases from Granat Bros. of ring ensembles?

A. Yes, I have got a record here of Wed-Lok rings from 1937.

Q. Is this record one of your regular office records? [22]

A. Yes, it is, our diamond register, one of our regular records.

Q. This is kept under your supervision, is it?

A. Yes. That is our stock record book.

Mr. Naylor: May I see this page? Are you offering that?

Mr. Hursh: Yes, I will offer this page as Exhibit 38.

Mr. Naylor: To which we object on the ground that no foundation has been laid, and that the same is incompetent and irrelevant to any issue in this case as thus presented.

(The page from the register referred to was thereupon marked as Plaintiff's Exhibit 38, and a photostatic copy thereof is made a part of this deposition.)

Q. (By Mr. Hursh): Do the notations appearing on this page showinng Wed-Lok rings mean that these rings were Grant Bros. products?

A. Well, everything in this book is Granat Bros. products unless otherwise marked.

Plaintiff's Exhibit No. J3—(Continued)
(Deposition of Moritz Jacoby.)

Q. Does this show your purchases of such ring ensembles under the trade-mark "Wed-Lok"?

A. Well, yes. Here is the style name. They use the style name and everything. Here, this was put in stock May the 10th, 1937, and this is their design "Wed-Lok".

Q. What is your practice with respect to selling these rings to the public? What trade-mark do you sell them under?

A. Under the name of Wed-Lok.

Q. I show you another page in this book and ask if you find any [23] notations of your purchases of wedding ring and engagement ring ensembles under the trade-mark "Wed-Lok"?

Mr. Naylor: To facilitate identification of the record, will you use a number where specified?

The Witness: Our stock number, you mean?

Mr. Naylor: I don't know what number it is; any number.

The Witness: We have our stock number.

Q. (By Mr. Hursh): Is this number at the head of the column the stock number that you employ? A. Yes.

Q. Referring to Exhibit 38, what date is that?

A. May the 10th, 1937.

Q. What number is that? A. 8093.

Q. What type ring is that?

A. Wed-Lok. And 8094, that is Wed-Lok.

Mr. Hursh: I will mark this page as Exhibit 39 and introduce it in evidence.

Plaintiff's Exhibit No. J3—(Continued)
(Deposition of Moritz Jacoby.)

(The page in the register referred to was thereupon marked as Plaintiff's Exhibit 39, and a photostatic copy thereof is made a part of this deposition.)

Q. (By Mr. Hursh): Mr. Jacoby, will you identify the Wed-Lok ring ensembles that are disclosed on that page?

A. We have 8104, 8105, 8106, and 8107, on May 11th, 1937.

Q. And those were all resold by you under the trade-mark "Wed-Lok"? [24]

A. Yes.

Mr. Naylor: What is the date? May 11th?

A. May 11th. 8104, 8105, 8106, and 8107.

Mr. Hursh: I refer you to 8103. What is that?

A. That is what we call the Interlock, the Wed-Lok Interlock.

Mr. Hursh: I will have this page marked Exhibit 40 and introduce it in evidence as such.

(The page in the register referred to was thereupon marked as Plaintiff's Exhibit 40, and a photostatic copy thereof is made a part of this deposition.)

Mr. Hursh: I will ask you if you can identify any Wed-Lok ring ensembles on that page and give the order numbers.

A. Yes. 8110, 8111, 8118 and 8120.

Mr. Naylor: All May 11th?

Plaintiff's Exhibit No. J3—(Continued)
(Deposition of Moritz Jacoby.)

A. All May 11th.

Mr. Naylor: Yes.

The Witness: That is the day we entered them into our stock.

Mr. Hursh: I see on some of these a later date has been placed in there. What date is that?

A. That is May the 17th.

Q. That refers to what?

A. Right here. We have got this one, 8118 and 8120.

Mr. Hursh: I will mark the next page as Exhibit 41.

(The page in the register referred to was thereupon [25] marked as Plaintiff's Exhibit 41, and a photostatic copy thereof is made a part of this deposition.)

Mr. Hursh: I will ask you to identify the Wed-Lok rings by date and number that are found on that page.

A. Well, May the 27th, 1937, our stock number 8133, and June 7th, 1937, 8142, and 8143 on the same date, June 7th.

Mr. Naylor: Mr. Groner has advised me that Mr. William J. O'Hearn, Jr., will appear on the Aurora, Illinois, Chicago, Illinois, and Buffalo, New York, depositions. It is stipulated that the Aurora depositions may be commenced at 11:00 a.m. as a matter of accommodation to Mr. O'Hearn in view of the train schedules.

Plaintiff's Exhibit No. J3—(Continued)
(Deposition of Moritz Jacoby.)

Mr. Hursh: It is so stipulated. It is also stipulated that the original notice shall be attached to this deposition and copies thereof to subsequent depositions?

Mr. Naylor: Yes.

Mr. Hursh: All right. The next page is marked Exhibit 42, and I will introduce it in evidence as such.

(The page of the register referred to was thereupon marked as Plaintiff's Exhibit 42, and a photostatic copy thereof is made a part of this deposition.)

Mr. Hursh: I will ask you to identify the Wed-Lok rings by date and number.

A. June the 29th, 1937, 8159.

Mr. Hursh: The next page is marked Exhibit 43 and so [26] introduced.

(The page from the register referred to was thereupon marked as Plaintiff's Exhibit 43, and a photostatic copy thereof is made a part of this deposition.)

Mr. Hursh: Can you identify the Wed-Lok rings appearing there?

A. Yes, on July 3rd, 1937, No. 8179.

Mr. Hursh: The next page I will mark Exhibit 44, and introduce it in evidence.

(The page from the register referred to was thereupon marked as Plaintiff's Exhibit 44, and

Plaintiff's Exhibit No. J3—(Continued)
(Deposition of Moritz Jacoby.)

a photostatic copy thereof is made a part of this deposition.)

Q. (By Mr. Hursh): Will you identify the Wed-Lok rings on that page?

A. On October the 23rd, '37, our number 8284.

Mr. Hursh: I will introduce the next page as Exhibit 45.

(The page from the register referred to was thereupon marked as Plaintiff's Exhibit 45, and a photostatic copy thereof is made a part of this deposition.)

Mr. Hursh: I will ask that you identify the Wed-Lok rings.

A. October 26, 1937, 8291, and on the same date 8294.

Mr. Hursh: The next page will be marked Exhibit 46.

(The page from the register referred to was thereupon marked as Plaintiff's Exhibit 46, and a photostatic copy thereof is made a part of this deposition.) [27]

Mr. Hursh: Will you identify the Wed-Lok ring ensembles on that page?

A. November 15, 1937, 8355, and on the same date 8358.

Mr. Hursh: The next page will be marked Exhibit 47 and introduced in evidence as Exhibit 47.

Plaintiff's Exhibit No. J3—(Continued)
(Deposition of Moritz Jacoby.)

(The page from the register referred to was thereupon marked as Plaintiff's Exhibit 47, and a photostatic copy thereof is made a part of this deposition.)

Mr. Hursh: Will you identify the Wed-Lok rings on that page?

A. May 2nd, '38, 8458—pardon me; 8453.

Mr. Naylor: And the date of that?

A. May the 3rd, 1938.

Mr. Hursh: Exhibit 48 will be the next page.

(The page from the register referred to was thereupon marked as Plaintiff's Exhibit 48, and a photostatic copy thereof is made a part of this deposition.)

Mr. Hursh: Where Wed-Lok is noted will you identify that?

A. May the 26th, 1938, 8464, and 8468 on the same date.

Mr. Hursh: The next page on which Wed-Lok rings is noted will be marked Exhibit 49.

(The page from the register referred to was thereupon marked as Plaintiff's Exhibit 49, and a photostatic copy thereof is made a part of this deposition.)

Mr. Hursh: Will you note the Wed-Lok rings?

A. September the 15th, 1938, 8583.

Mr. Hursh: The next page will be marked Exhibit 50.

Plaintiff's Exhibit No. J3—(Continued)
(Deposition of Moritz Jacoby.)

(The page from the register referred to was thereupon marked as Plaintiff's Exhibit 50, and a photostatic copy thereof is made a part of this deposition.)

Mr. Hursh: Will you identify the Wed-Lok rings?

A. November 11th, 1939, our No. 9020.

Mr. Hursh: The next page will be marked Exhibit 51.

(The page from the register referred to was thereupon marked as Plaintiff's Exhibit 51, and a photostatic copy thereof is made a part of this deposition.)

Mr. Hursh: Will you identify the Wed-Lok rings on that page?

A. December the 9th, 1939.

Q. What is the number? A. 9081.

Mr. Hursh: This page will be marked Exhibit 52.

(The page from the register referred to was thereupon marked as Plaintiff's Exhibit 52, and a photostatic copy thereof is made a part of this deposition.)

Mr. Hursh: Do you find any Wed-Lok rings noted?

A. October 11, 1941, No. 9810.

Q. Were all of these rings that you have iden-

Plaintiff's Exhibit No. J3—(Continued)
(Deposition of Moritz Jacoby.)

tified as sold under the trade-mark "Wed-Lok" resold by you under the same trade-mark?

A. Oh, yes.

Q. Have you continuously, so long as you have been able to secure [29] Wed-Lok rings from Granat Bros., purchased them and sold them?

A. Oh, yes.

Mr. Naylor: That is objected to as hypothetical and not calling for the best evidence. If there are records, let's see them.

Mr. Hursh: I notice that there are no records in this book of Wed-Lok ring ensembles after the ensemble noted on Exhibit 52. Do you have any explanation for the lack of Wed-Lok rings found in your records after that date?

A. Well, during the War they were not making all those styles. They were just making a few, a certain few rings. They eliminated making a lot of them.

Q. What percentage of wedding ring and engagement ring sales would you say you make under the trade-mark "Wed-Lok"?

Mr. Naylor: Let's get some time in this question.

Mr. Hursh: We will set it for the past year.

A. Well, I never kept track of it—you mean the percentage compared to other ensembles we sell?

Q. Yes, wedding ring-engagement ring ensembles you sell.

Plaintiff's Exhibit No. J3—(Continued)
(Deposition of Moritz Jacoby.)

A. Oh, at least one-third is as close as I could say.

Q. I noticed on coming into your store you have a display of Wed-Lok rings. How long has that display been in your window?

A. We keep changing displays around. We have one in there all the time.

Q. Do you feature Wed-Lok rings in those displays? A. Oh, yes. [30]

Q. Have you ever heard of a wedding ring-engagement ring ensemble sold under the trade-mark "Feature Lock"? A. Yes.

Q. When you first heard of this Feature Lock wedding ring-engagement ring ensemble what was your first reaction?

A. Well, the first I heard of it——

Mr. Naylor: That is objected to as calling for an opinion of this witness.

Mr. Hursh: Continue.

A. I didn't hear, but I picked up the paper one evening and saw an ad of those Feature Lock rings, and I hit the ceiling because I thought that Granat Bros. were double-crossing me. For a minute I thought it was the same identical thing.

Q. What do you mean when you state that you thought Granat Bros. was double-crossing you?

Mr. Naylor: I move that that part of the answer in which he expresses the opinion be stricken.

Mr. Hursh: Will you read the question?

Plaintiff's Exhibit No. J3—(Continued)
(Deposition of Moritz Jacoby.)
(Last question read.)

A. Well, we have an understanding here with them. There is only myself and another jeweler that they sell to, and I thought they had picked up another jeweler.

Q. How long ago was it that you first heard of this Feature Lock engagement ring ensemble?

A. It was close to a year ago. [31]

Q. To whose product did you think the trade-mark "Feature Lock" was applied when you first saw it?

A. Why, I thought it was a Granat Bros. product.

Mr. Naylor: That is objected to for the same reason, calling purely for the opinion of this witness.

Mr. Hursh: At the time you first heard of this Feature Lock trade-mark were you confused as to whose product the trade-mark was applied to?

Mr. Naylor: That is objected to for the obvious reason it is purely calling for the opinion and conclusion of this witness, which can have no bearing on the outcome of this case; and, furthermore, it seeks to oust the Judge from a thing yet to be decided.

Mr. Hursh: It is asking for the actual state of mind of this witness when he first heard of this trade-mark, which has an important bearing upon the issues raised by the pleadings in this case.

Plaintiff's Exhibit No. J3—(Continued)
(Deposition of Moritz Jacoby.)

Q. Will you state whether or not the word "Lok" is a valuable part of the trade-mark "Wed-Lok" when applied to wedding ring and engagement ring ensembles?

Mr. Naylor: That is objected to for the obvious reason, as previously stated, that the word "Lock," no matter how it is spelled, not associated with other words, has no materiality to any issue in this case because no rights are claimed therein.

Mr. Hursh: Will you answer. [32]

The Witness: Let me get the question.

(Last question read.)

A. Well, yes.

Q. (By Mr. Hursh): Have you ever had customers come into your store and ask for ring ensembles, calling for them by the trade-mark "Wed-Lok"? A. Oh, yes; lots of them.

Q. Does that occur frequently?

A. Oh, yes. We also have them come in here and ask for Wed-Loks, and then when we show them to them they say, "Why, this is entirely different than I have seen elsewhere." That just happened here a few days ago.

Q. Did you ever have customers come in and ask for rings by calling them lock ring ensembles?

Mr. Naylor: How do you spell that, Mr. Hursh?

Mr. Hursh: It makes no difference, either l-o-c-k or l-o-k. They don't usually spell it when they

Plaintiff's Exhibit No. J3—(Continued)
(Deposition of Moritz Jacoby.)

come in and ask for a ring in that particular manner.

A. Oh, yes, they come and ask for lock rings.

Mr. Naylor: That is objected to as calling for hearsay.

Mr. Hursh: Were you ever offered Feature Lock mountings?

A. Oh, yes.

Q. Who made such an offer to you?

A. Mayer Bros. in Seattle.

Q. Have you ever seen the Feature Lock mountings? [33] A. Yes.

Q. What would you say the quality of the Feature Lock mountings would be as compared to the Wed-Lok ring ensembles?

Mr. Naylor: That is objected to as calling for the opinion of this witness, which would have no bearing whatever on this case.

Mr. Hursh: Mr. Jacoby has been in the jewelry business for many, many years. He can immediately look at a piece of jewelry and determine the quality of it, and the quality of the product and the reptuation of the product is a very important part of this case. Will you answer the question, Mr. Jacoby?

A. Well, there is absolutely no comparison, the Granat Bros. merchandise is so superior to what these people showed me.

Plaintiff's Exhibit J 3—(Continued)

(Deposition of Moritz Jacoby.)

Mr. Naylor: Who do you mean by "these people?"

A. Mayer.

Mr. Naylor: I move "these people" be stricken unless——

A. Mayer Bros.; Seattle, Washington.

Mr. Hursh: No further direct examination.

Cross-Examination

By Mr. Naylor:

Q. Has it been your practice in advertising Wed-Lok rings to advise the public that the rings bearing that name lock together?

A. Yes, "two rings that lock as one—an exciting new discovery—Wed-Lok."

Q. Now you are referring to what? [34]

A. To Wed-Lok rings.

Q. What is that? Exhibit No. 4?

A. Well, it is the first one I picked up. You see here the heading is "Wed-Lok Wedding and Engagement rings that lock as one."

Q. What is the significance of the word "Lock" as you intended it in that advertisement?

A. That they lock together, snap together.

Q. Lock together by some mechanical means?

A. Yes, sure; they have to.

Q. What was the mechanical means, Mr. Jacoby?

A. They snap together, a couple of snaps.

Q. I am speaking at the time of Exhibit 4.

Plaintiff's Exhibit J 3—(Continued)
(Deposition of Moritz Jacoby.)

A. That is right. Here it shows their picture. It shows right here. It says: "To lock align rings at top. Press gently until they click together, become as one."

Q. Now what form of lock was used in the ring advertised in Plaintiff's Exhibit 4?

A. Wed-Lok.

Q. No, what kind of lock? Just describe for us the nature and character of the locking mechanism?

A. Well, it is made male and female. The wedding ring has a little knob, as I would term it. That is on the wedding ring, and the wedding ring fits into the diamond ring, which has two holes at each side that these knobs fit right into. [35]

Q. It is a snap fastener, in other words, isn't it? A. Yes, that is what we call it.

Q. It is a snap fastener such as you find on key containers?

A. Oh, no, no. It is made entirely different than that.

Q. What is the difference?

A. Well, one is a big, bulky thing, and the other is—this is built in a little post like——

Q. There is a difference in size, then?

A. Well, no, not in size; in construction entirely.

Q. Is that the device that is being used in Wed-Lok rings today?

Plaintiff's Exhibit J 3—(Continued)

(Deposition of Moritz Jacoby.)

A. They have two styles out.

Q. What are they?

A. Well, one that dovetails together, and the one that snaps together.

Q. Will you tell us about the dovetail connection?

A. The one that slips into a little slot.

Q. One ring is slotted and the other one has a protuberance on it? A. Yes.

Q. The protuberance drops in the slot to prevent the rotative disengagement of the wedding ring and engagement ring? A. Yes.

Q. And the snap type is the second type of which you spoke; is that right? [36]

A. Yes. Incidentally, I might add that we haven't had any of the ones that dovetail together as yet. We have got them on order.

Q. What do you mean?

A. We saw the samples of them.

Q. Since the War, you mean? A. Yes.

Q. Since the War?

A. Yes, I saw samples.

Q. For what period of time have you been unable to get the dovetail connection?

A. Quite some time.

Q. How far back does it go?

A. '41 or '42.

Q. Up to date? A. Yes.

Q. But you have seen samples of them?

Plaintiff's Exhibit J 3—(Continued)
(Deposition of Moritz Jacoby.)

A. Oh, yes.

Q. And in the meantime, since the approximate date of Plaintiff's Exhibit 4, you have been handling Wed-Lok rings utilizing a snap fastener mechanism alone? A. Right.

Q. Is that right? A. Yes.

Q. Now, is there any identification in Exhibit 4 of the manufacturer [37] of Wed-Lok rings?

A. No. It doesn't say who they are manufactured by.

Q. Will you take a look at the next exhibit, 5, and state whether or not the manufacturer is identified in that ring? A. No.

Q. Will you read the flash line on that ad. That would be the top three lines?

A. "It's like magic. Two rings join together, become as one. Wed-Lok at Jacoby." Is that what you mean?

Q. Yes. Now look at Exhibit 4 again, please.

A. You see, we have a little star here in Exhibit 5. It hasn't got the manufacturer's name; it is a little asterisk here which shows: "Wed-Lok rings are protected by U. S. patents issued and pending."

Q. And nothing said about Granat Bros. in there, is there?

A. No. In none of our ads do we use the word "Granat" because we use their product, and they are patented and we feel that we don't need to use their name.

Plaintiff's Exhibit J 3—(Continued)

(Deposition of Moritz Jacoby.)

Q. You don't tell the public that Granat Bros. make the rings?

A. Inside we do lots of times use the name.

Q. But not in your ads; not in your published ads? A. No.

Q. Have you ever done it?

A. Well, possibly have in years gone by.

Q. You can't put your finger on it, however?

A. Right today, no, unless I can get some of my old records.

Q. Will you now take a look at Exhibit 11 and state whether or not you see in that ad the expression "They lock together"? A. Yes.

Q. Where does it appear?

A. "They lock together when worn together." And underneath here it says: "To lock, align rings at top. Press gently until they click together and become as one."

Q. In what sense are you using the word "lock" in that ad? A. To lock the rings together.

Q. That is telling people how they go together, isn't it?

A. Yes; that the design—it locks together, this particular design of ring.

Q. Will you examine 15 and state whether or not you see the expression "lock together" in that ad?

A. Yes, "Two rings become one; Wed-Lok rings that actually lock together."

Plaintiff's Exhibit J 3—(Continued)

(Deposition of Moritz Jacoby.)

Q. So you used the word "l-o-c-k" in that ad?

A. No, "l-o-k" we used.

Q. I beg your pardon—"That actually l-o-c-k together."

A. Yes, "That actually l-o-c-k together."

Q. You used the "l-o-c-k" there in what sense?

A. Describing the Wed-Lok ring.

Q. Will you now examine Exhibit 18. Will you read the caption of that ad? [39]

A. "To become one in Wed-Lok."

Q. What is the significance of that phrase as you intended it in that ad?

A. The two rings become one. It says: "Wed-Lok wedding ensembles lock securely together. They may be worn separately whenever you choose. No unsightly bands or soldering mars their artistic beauty."

Q. Now, will you examine 23, please. Will you read the caption of that ad?

A. Well, there is two captions. "These are the rings that Wed-Lok together."

Q. In what sense were you using that phrase?

A. The two rings become as one.

Q. That means that they lock together?

A. Yes.

Q. Prior to the War did you receive from Granat Bros. engagement and wedding ring ensembles that were engaged together by a dovetailing connection?

Plaintiff's Exhibit J 3—(Continued)
(Deposition of Moritz Jacoby.)

A. We had Wed-Loks. I can't just recall how they operated.

Q. They didn't have a snap fastener?

A. No, they didn't have this same principle as this one; no.

Q. You mean the current one? A. Yes.

Q. That is what you are referring to?

A. Yes. [40]

Q. Do you recall what sort of mechanical contact or connection they had?

A. We had some that dovetailed.

Q. Prior to the war? A. Oh, yes.

Q. Now, one further ad. Will you please examine No. 28. What is meant by the expression in that ad, "No other rings can make this claim"?

A. Just what it says.

Q. Can make a claim of rings locking together?

A. Yes.

Mr. Hursh: Will you read the caption of that ad appearing in heavy print, please.

A. "It is impossible ever for rings to bother you by constantly twisting and turning—Wed-Lok ensembles by Jacoby."

Q. (By Mr. Naylor): Now, start with "No other rings," and read that part of the ad.

A. "No other rings can make this claim, for no other rings but Wed-Lok has the secret and hidden lock. Jacoby presents this famous patented ring device mounted with perfect diamonds, glorious with side diamonds—crafted of precious met-

Plaintiff's Exhibit J 3—(Continued)

(Deposition of Moritz Jacoby.)

als. And the cost for such luxury is so little—for at Jacoby, where value is yours exclusively, Wed-Lok rings cost no more than ordinary wedding ensembles."

Q. To what were you referring there? Rings manufactured by [41] Granat?

A. Well, these are all Granat Bros. rings.

Q. You don't mention Granat in the ad, do you? A. Oh, no.

Q. Did you write the copy for that ad or did your advertising man?

A. Our advertising man under our supervision. And those are partly gotten from Granat Bros. We take a service from them, and that is where he gets his ideas from.

Q. Actually, you took them from Joe Weinroth, didn't you, of the Granat Manufacturing Company?

A. No, they come directly from Granat Bros.

Q. Directly from Granat Bros.? A. Yes.

Q. What did they do? Supply you with mats?

A. If we want them, yes. They supply us with photographs, and we get all their ads. They have a service; they send us original copies of all their ads direct from Granat Bros.

Q. Then you use those in your advertising campaign here? A. Oh, yes. We cut them up.

Q. By "cut them up" you mean——

A. We rearrange them.

Plaintiff's Exhibit J 3—(Continued)

(Deposition of Moritz Jacoby.)

Q. Rearrange them to suit your own desires?

A. Sure.

Q. You change the copy to suit your own desires? **[42]**

A. If the copy don't suit us. But these ads, 90 per cent of the wording is taken directly from Granat Bros. ads in all these Wed-Loks.

Q. Now, I think you mentioned that during the war years Granat Bros. were not making Wed-Loks. Is that your testimony?

A. Yes. Pardon me—as far as I know. At least, they might have been making them but we were unable to purchase any from them. At least I was not able to purchase any from them. Whether they were making them or not I can't tell.

Q. Did you send any orders in?

A. There was no orders. I used to go down and buy what I could. They were not accepting orders.

Q. In any event, you were not able to place an order and receive the goods?

A. I wasn't able to order anything from them. I used to go down and get what I could from them, or they sent me whatever they had whether I ordered it or not.

Mr. Hursh: Did that same condition apply to other merchandise?

A. Oh, yes. That didn't alone apply to them. We would take what they had.

Plaintiff's Exhibit J 3—(Continued)
(Deposition of Moritz Jacoby.)

Mr. Naylor: Your last purchase prior to the war, Mr. Jacoby, according to Exhibit 52, was November 11, 1941. I take it that the next one coincided approximately with Exhibit 4 in May of 1947? [43]

A. I didn't quite get you.

(Last question read.)

A. Yes, that might have been purchased in '41 or '40. We mounted it and put it in stock. We put a lot of things to one side. It could have been purchased in '41. It all depends. It may have been purchased six months before we used it.

Q. Will you please examine Exhibit 39 in your Diamond Register, and state what is entered opposite 8103 as the identification of the merchandise?

A. This is "Wed-Lok Interlock."

Q. What is the significance of that?

A. Well, we used the word "Interlock" sometimes in describing it, "Interlock" or "Wed-Lok." This is the only order we used "Interlock." The rest are all "Wed-Lok." I don't know how that happened to be in here "Interlock."

Q. But what is the significance of "Interlock" as you used it?

A. That was just something to describe it to us. They had used two or three different types of Wed-Loks—designs, I should say. The principle was the same. We described some of them as "Interlocks" so we could distinguish one design from another. That was done for our convenience.

Plaintiff's Exhibit J 3—(Continued)
(Deposition of Moritz Jacoby.)

Q. Were they design names?

A. They called them all Wed-Loks.

Q. No, I mean didn't you use that expression "Interlock" as a design name?

A. No, to describe it to ourselves in the store so we knew which [44] particular ring it meant at that time.

Q. Did you have other rings at that time?

A. Other rings?

Q. Other than Interlock?

A. Oh, yes. They sold all kinds of rings.

Q. I am speaking of rings under the trade-mark "Wed-Lok."

A. They had different designs, yes. They had several designs.

Q. Did they give a different name to each design?

A. Oh, no. We even called them in here "Wed-Lok" or "New Wed-Lok." You see, as time went on they changed the design and style, so that we have our own reference to tell which one that was. Just like they have got numbers now. They work under numbers. At that time they called everything "Wed-Lok." We had to distinguish what we wanted when we wanted to re-order something there.

Q. During the war years was there a trend to a narrower combination of wedding and engagement rings?

A. You mean from the selling feature?

Q. Yes.

Plaintiff's Exhibit J 3—(Continued)

(Deposition of Moritz Jacoby.)

A. No more than before. We sold a lot of narrow rings. I mean we sold a lot of wide rings.

Q. Was there a definite trend commencing in '41 to a narrower ring?

A. Oh, no. We had narrow rings long before that. As far as narrow rings, we had them long before that. [45]

Q. I take it from what has developed here this morning that you did not advertise Wed-Lok in the period 1941 to 1947, did you?

A. When we didn't have them we didn't, no.

Q. You didn't have them?

A. No. We destroyed our records, and we were trying to check on that. We might get them from our advertising counsellor.

Q. But you don't remember any at this moment?

A. I can't give you exact dates. You know what I mean; I know we used it, but it is useless for me to tell you unless I can lay my finger on it.

Q. I am speaking from 1941 to May of 1947; in other words, prior to Exhibit 4.

A. What year was the war?

Q. Exhibit 4 was June the 4th, 1947. Do you know of any advertisement between that date and, say, January 1st, 1941?

A. I couldn't offhand say unless I check all our ads.

Q. Well, you know from your records that you did not have any merchandise on hand, don't you?

Plaintiff's Exhibit J 3—(Continued)

(Deposition of Moritz Jacoby.)

A. Well, we had it in stock. We didn't sell everything out right away, you know. Those are the dates that we put it in stock, but that doesn't show the dates it was sold.

Q. All right. As of the last purchase in 1941—what was the last purchase, by the way?

A. What was the last purchase?

Q. Yes, in 1941. [46]

A. That is asking me something I can't recall offhand.

Q. November 11, 1941, Exhibit 52?

A. That was put in stock on November 11, 1941.

Q. Is that 9810? A. 9810.

Q. How many ensembles?

A. Now pardon me. This particular one was sold in '42, this particular ensemble. A year after, exactly; it was put in stock October 10th, 1941, and it was sold September 11th, 1942.

Q. That was one ensemble?

A. That particular ensemble, yes.

Q. Take a look at 51, No. 9081, purchased December 9th, 1939, and tell us the quantity that was involved there.

A. These are all ones, every one of these. There is only one. Each ring has its own individual number. We don't enter more than one to any number.

Q. All the numbers you have given, then, represent but one ensemble? A. That is correct.

Plaintiff's Exhibit J 3—(Continued)

(Deposition of Moritz Jacoby.)

Q. In other words, none of these numbers would refer to a half a dozen ensembles? A. No.

Q. Or any quantity over one?

A. That is correct. That is why each one has its individual number. [47]

Q. So that between May 10th, 1937 and November 11th, 1941, the total number of Wed-Lok ensembles handled by you amounted to 27. Is that approximately right?

A. Whatever that counts up to. I don't know.

Q. It is substantially less than fifty, anyway, is it not?

A. I mean I would have to count.

Q. Are you acquainted with your neighbors down the street? A. Am I acquainted with them?

Q. Yes. A. Oh, yes; sure.

Q. I am speaking of the folks, of course, who run Dan Marx & Company at 511 Southwest Broadway, Portland, Oregon. Are you acquainted with Mr. Block? A. Yes.

Q. Mr. Renne Block, is it? A. Yes.

Q. And that store is situated how far from your place of business?

A Oh, maybe a couple of hundred feet—it couldn't be a couple hundred feet. It is only about one hundred feet or maybe one hundred fifty feet.

Q. Has it ever come to your attention that he is advertising the Feature Lock wedding ring ensemble?

Plaintiff's Exhibit J 3—(Continued)
(Deposition of Moritz Jacoby.)

A. I can't help but see the ads in the paper.

Q. I show you a page, page 16, of the Sunday Oregonian for February 6th, 1949, and ask you if you happened to see that [48] particular ad.

A. Yes, I saw that yesterday. Yes, I saw yesterday's Oregonian.

Q. Have you seen other similar ads inserted by Dan Marx & Company? A. Oh, yes.

Q. With the Feature Lock? A. Oh, yes.

Q. And aside from the name of the concern, Dan Marx & Company, will you state what are the most prominent words in the ad as you see it?

A. It is this "Feature Lock." "They lock together."

Mr. Naylor: I will offer that as Defendant's Exhibit A on this deposition, with the stipulation that a photostatic copy may be substituted.

Mr. Hursh: Yes.

(The advertisement referred to, dated February 6, 1949, was thereupon marked as Defendant's Exhibit A, and a photostatic copy thereof is made a part of this deposition.)

Mr. Naylor: I understood you to say that 90 per cent of your stock is Granat Bros. merchandise, Mr. Jacoby? A. What they make, yes.

Q. You are a pretty good customer of theirs, then? A. Oh, sure.

Q. Has that always been true? [49] A Yes.

Plaintiff's Exhibit J 3—(Continued)

(Deposition of Moritz Jacoby.)

Q. Are you their largest customer in Portland, Oregon, would you say?

A. I can't answer. They have got another account. I haven't any idea what he buys.

Q. Are you longer in point of time than the other customer?

A. I can't recall that, either. They have been in business many years.

Q. Who is that other customer?

A. Roy Molin.

Q. In the business prior to the war how were the Granat Bros. Wed-Lok rings identified when they came into your hands?

A. From the style; from the design.

Q. No, I mean how were they identified with the words "Wed-Lok"? Were the words "Wed-Lok" applied to them in any way?

A. Why, sure. They sold them as Wed-Lok.

Q. Was the term visibly applied to the rings or to the boxes?

A. I don't know anything about the boxes. It was applied to the rings.

Q. Where?

A. How do you mean, where?

Q. In the ring or on the ring?

A. You mean in the ring?

Q. Yes.

A. I can't remember that it was stamped Wed-Lok inside or not. [50]

Plaintiff's Exhibit J 3—(Continued)

(Deposition of Moritz Jacoby.)

Q. You can't recall?

A. I can't recall that.

Q. What is the practice today?

A. I can't even tell you that offhand, whether they are stamped "Wed-Lok." They have a patent number inside today, I think. I don't know whether they have—have they the word "Wed-Lok" stamped inside? I mean I don't know whether they are stamped "Wed-Lok." I never looked in them myself. I can get one and look at it if you want to know. Do you know whether they are stamped?

Q. No. I just wanted to know what your recollection was.

A. They have a serial number and a patent number on the inside, I think.

Mr. Naylor: I think that is all.

Redirect Examination

By Mr. Hursh:

Q. Can you tell us, Mr. Jacoby, why you purchase the quantity of Granat Bros. products that you do purchase here in your store?

A. Yes. We had used other lines prior to that, and I have shopped in the East and West and all over, and I found out they have got the finest line that I can buy, and that is what we build our business on, is fine quality merchandise.

Q. In other words, that is why you buy Granat Bros. products? A. Yes, naturally. [51]

Plaintiff's Exhibit J 3—(Continued)

(Deposition of Moritz Jacoby.)

Q. When the trade-mark "Wed-Lok" is used in connection with the Granat Bros. ring ensembles, to you does that describe the entire ring ensemble or does it describe just one particular feature of that ring ensemble?

A. The mechanism; the mechanical part.

Mr. Hursh: That is all.

Mr. Naylor: That is all.

Mr. Hursh: We have stipulated it will be unnecessary for you to read and sign your deposition. Do you also waive the right to read and sign your deposition?

The Witness: Yes.

(Witness excused.)

(Reading and signature waived.)

United States of America,
State of Oregon,
County of Multnomah—ss.:

I, the undersigned, a Notary Public for Oregon, residing at Portland, Multnomah County, do hereby certify that on Monday, February 7, 1949, before me as such Notary, at 529 Southwest Broadway, Portland, Oregon, personally appeared, pursuant to Notice of Taking Depositions and the oral stipulation herein before set forth, Moritz Jacoby, a witness in behalf of the plaintiff herein; that Mr. Jack E. Hursh, of attorneys for the plaintiff, appeared

Plaintiff's Exhibit J 3—(Continued)

in its behalf, and Mr. James M. Naylor, of attorneys for the defendants, appeared in their behalf; and the said witness being by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, and being carefully examined, in answer to oral interrogatories propounded by the attorneys above named on direct and cross-examination testified as in the foregoing annexed deposition, pages 1 to 52, both inclusive, set forth.

I further certify that all interrogatories propounded to said witness, together with the answers of said witness thereto, and all objections and motions taken or made, and other proceedings occurring upon the taking of said deposition, were then and there taken down by me in shorthand and thereafter reduced to typewriting, and that the foregoing transcript, pages 1 to 52, both inclusive, constitutes a full, true and accurate transcript of said deposition and proceedings, so taken by me in shorthand as aforesaid; and that the submission of said deposition, when transcribed, to the witness for examination and reading to or by him and opportunity to the witness to make any changes in form or substance and the signing of same by the witness were waived; and that said deposition has been retained by me for the purpose of sealing up and filing with the Clerk of the above-entitled court, as required by law.

I further certify that the photostatic copies of

Plaintiff's Exhibit J 3—(Continued)

documents annexed hereto, numbered "1" to "52," both inclusive, are photostatic copies of the identical documents so marked as exhibits in behalf of the plaintiff upon the taking of said deposition.

I further certify that I am not a relative or employee or attorney or counsel for any of the parties, or a relative or employee of such attorney or counsel, or financially interested in the said action.

In Witness Whereof, I have hereunto set my hand and notarial seal this 10th day of February, 1949.

[Seal]: /s/ JOHN S. BECKWITH,

Notary Public for Oregon, residing at Portland, Multnomah County, Oregon.

My commission expires May 31, 1950.

[Endorsed]: Filed Mar. 16, 1949.

[Title of District Court and Causes.]

PLAINTIFF'S EXHIBIT K3

Be It Remembered That, pursuant to the Notice of Taking Depositions attached to the deposition of Moritz Jacoby and filed with said deposition, a copy of which notice is hereto annexed, and the further oral stipulation of counsel appearing in behalf of the respective parties hereinafter set forth, the deposition of Holly G. Jackson was taken in behalf of the plaintiff in the above-entitled actions on Monday, February 7, 1949, beginning at the hour of 2:00 o'clock p.m., at 225 North Liberty Street, Salem, Oregon, before John S. Beckwith, a Notary Public for Oregon, residing at Portland, Multnomah County, Oregon.

Appearances:

MR. JACK E. HURSH,
Appearing for Messrs. Mellin and Hanscom,
391 Sutter Street,
San Francisco, California,
Attorneys for the plaintiff.

MR. JAMES M. NAYLOR,
Appearing for John Vaughan Groner,
Russ Building,
San Francisco, California,
of Attorneys for the defendants.

(At said time and place the following stipulation was entered into between counsel present in behalf of the respective parties:)

Plaintiff's Exhibit K3—(Continued)

It is stipulated and agreed by and between the attorneys for the respective parties in the above-entitled actions, that the deposition of Holly G. Jackson may be taken on behalf of the plaintiff in the above-entitled actions, [2*] at 225 North Liberty Street, Salem, Oregon, at the hour of 2:00 o'clock p.m., before John S. Beckwith, a Notary Public for Oregon, and in shorthand by the said John S. Beckwith.

It is further stipulated that said deposition, when fully transcribed, may be used on the trial of the actions above mentioned as by law provided; that all objections as to the form of the questions are waived unless made at the time the questions are asked, and that all objections as to the materiality, relevancy and competency of the questions or answers are reserved to the parties until the time of trial.

It is further stipulated that the submission of the deposition, when fully transcribed, to the witness for examination and reading to or by him and opportunity to the witness to make any changes in form or substance and the signing of same by the witness are hereby expressly waived.

Mr. Hursh: Will you stipulate that Mr. Beckwith, in accordance with the Oregon statute, is authorized to administer oaths throughout the State of Oregon?

Mr. Naylor: He is an Oregon notary. [3]

* **Page numbering appearing at top of page of original Reporter's Transcript.**

HOLLY G. JACKSON

was thereupon produced as a witness in behalf of the plaintiff and, having been first duly sworn by the Notary, was examined and testified as follows:

Direct Examination

By Mr. Hursh:

Q. Will you state your name, please.

A. Holly G. Jackson.

Q. What is your residence?

A. 3490 Donald Way.

Q. That is in Salem, Oregon? A. Yes.

Q. What is your occupation?

A. I am a jeweler.

Q. Over what period of time have you been engaged as a jeweler?

A. Now you are going to get technical. It is about 27 years.

Q. Do you know of a company by the name of Granat Bros.? A. I do, sir.

Q. What type of product do they manufacture and sell?

A. Well, rings, watch cases, and a few bracelets, I guess.

Q. Do you know where that company is located?

A. San Francisco.

Q. How long have you known of Granat Bros.?

A. Oh, all of 20 years, I would say.

Q. Have you ever heard of a wedding ring-engagement ring [4] ensemble that is sold under the trade-mark "Wed-Lok"?

Plaintiff's Exhibit K3—(Continued)

(Deposition of Holly G. Jackson.)

A. I sell them. I guess I should.

Q. Do you know who manufactures the Wed-Lok ring ensemble? A. Granat Bros.

Q. And over what period of time have you known of the wedding ring-engagement ring ensemble that has been sold under the trade-mark "Wed-Lok"? A. Well, about five years.

Q. You say you sell those rings in your store here? A. I do, sir.

Q. When you see or hear the word "lock," either spelled l-o-k or l-o-c-k as part of a trade-mark for wedding-ring and engagement ring ensembles, whose product do you identify that word with?

Mr. Naylor: Just a moment. Will you repeat that question?

(Last question read.)

Mr. Naylor: That question is objected to for the reason that it pertains to something that is not in issue in this case, there being no claim to the word "l-o-c-k" or the word "l-o-k" per se.

Mr. Hursh: Go ahead and answer the question.

A. Well, I naturally connected it with Granat Bros. inasmuch as I sell them. And up until the last six months I never knew there was any other kind of a locking ring.

Q. Are you familiar with the trade-mark "Feature Lock" used [5] on ring ensembles?

A. I am, sir.

Plaintiff's Exhibit K3—(Continued)

(Deposition of Holly G. Jackson.)

Q. To what particular type products is this trade-mark "Feature Lock" applied?

A. I don't just quite get the question.

Q. What jewelry is the trade-mark "Feature Lock" identified with?

A. It is rings, wedding rings and diamond rings.

Q. Engagement rings, too?

A. That is right.

Q. What was the first impression that came to your mind when you first heard or saw the trade-mark "Feature Lock" in connection with a wedding ring-engagement ring ensemble?

Mr. Naylor: Just a moment. That question is objected to as calling for the opinion and conclusion of this witness.

Mr. Hursh: Go ahead and answer the question.

A. Well, I thought it was another Granat ring. That is what I thought.

Q. When did you first hear of this ensemble known as the Feature Lock ensemble?

A. Oh, some six months ago, I imagine, was the first I heard of it.

Q. At the time you first heard of it were you confused as to whose product was identified?

Mr. Naylor: Same objection. [6]

A. Well, as I stated before, I thought it was a Granat ring inasmuch as Granat make a threesome. They make a threesome ring which fits into the Wed-Lok picture itself.

Plaintiff's Exhibit K3—(Continued)

(Deposition of Holly G. Jackson.)

Q. What products of Granat Bros. do you sell here in your store?

A. Well, I sell their complete line.

Q. You mean their ring line?

A. Complete ring line. I do not sell any of their cases. I sell their ring line, their Wed-Lok line. As a matter of fact, I try to stock all of their numbers in rings.

Q. Have you ever advertised your sale of this Wed-Lok wedding ring-engagement ring ensemble?

A. I have it on the air and in the paper too.

Q. How often do you advertise it, for example, on the radio?

A. Well, that is something I just—probably two or three times a month. I will have it on a week at a time.

Q. You mean you will mention the Wed-Lok ring ensemble in your radio program say for a week at a time every day during that week?

A. That is right; for a week at a time. I try to instill it into the public's mind, and then I will turn around and I will run watches a week. That is the way I will do it.

Q. How often do you run newspaper ads advertising the Wed-Lok ensemble?

A. Well, I would have to check that. I have a column in the [7] paper and I mention Wed-Lok, I mention my watch line, and I run them in together. How often I run Wed-Lok—I would have

Plaintiff's Exhibit K3—(Continued)
(Deposition of Holly G. Jackson.)

to check on it. I am not in a position to say at this time.

Q. Do you run any ads in the newspaper advertising Wed-Lok exclusively?

A. I do; yes, sir.

Q. How often do you run those ads?

A. Oh, probably once a month. I am not sure. I would have to check on that.

Q. How long have you been advertising in this manner?

A. Well, it will be just about five years now. It will be four and a half years, is what it is, to be exact. But I haven't had the Granat line. I have run these ads and this column, all right. I have been writing them now for about four and a half years.

Q. How long have you been advertising Wed-Lok ring ensembles in your column and on the radio and in special newspaper ads featuring the Wed-Lok ensemble?

A. Since I have taken on the Granat line, which has been about a year.

Q. You have just taken on the Granat line about a year ago? A. That is right, sir.

Q. How long have you been in business here in Salem for yourself? [8]

A. It will be five years the first of August.

Q. Can you explain why you did not advertise Wed-Lok prior to a year ago?

Plaintiff's Exhibit K3—(Continued)

(Deposition of Holly G. Jackson.)

A. Well, the main reason, I didn't have the line.

Q. Did you attempt to get the line?

A. I wanted the line, but it was not available when I opened my store.

Q. During the past year approximately how many Wed-Lok ring ensembles would you say you have sold in your store?

A. Well, I can't state that. I have an idea about it in regard to percentage of my business, how much I sell. It will probably run around 20 per cent of my diamond business, roughly.

Q. In other words, if I get your answer correctly, about 20 per cent of all diamond rings that you sell in this store is of the Wed-Lok ensemble type?

A. The Threesome and the Wed-Lok combined.

Q. You mention this Wed-Lok Threesome. What does that set comprise? A. Please?

Q. What does the Wed-Lok Threesome set comprise? What is that particular set?

A. That comprises the Wed-Lok diamond engagement ring, wedding ring, plus a man's wedding ring to match.

Q. What is the man's wedding ring known as? What trade-mark [9] is that sold under?

A. Threesome. That is sold under the Threesome. That makes up the Threesome.

Q. I see. Is there any other trade-mark con-

Plaintiff's Exhibit K3—(Continued)
(Deposition of Holly G. Jackson.)

nected with that particular man's ring? Is it known as the Wed-Lok Threesome, for example?

A. That is right. It is the Wed-Lok Threesome.

Q. Do you consider the word "Lok" to be a valuable part of the trade-mark "Wed-Lok" which you employ on these ring ensembles?

Mr. Naylor: That question is objected to as pertaining to something that is beyond the issues in this case, since there is no assertion of the right to use the word "lock," no matter how you spell it; further, calling for the mere opinion of this witness.

Mr. Hursh: Go ahead and answer the question, Mr. Jackson.

The Witness: What was the question?

(Last question read.)

A. Well, I personally do. We are getting more calls for it every day. It stands to reason it has a certain bearing. I think it definitely has a place in our business.

Q. Do customers come into your store and ask for Wed-Lok ring ensembles by that name?

Mr. Naylor: What name?

Mr. Hursh: Wed-Lok. [10]

A. They do. As a matter of fact, I had two of them Saturday here.

Q. And did you sell them Wed-Lok ring ensembles in answer to their request for Wed-Lok ensembles?

Plaintiff's Exhibit K3—(Continued)

(Deposition of Holly G. Jackson.)

A. I did sell them, anyway. That is right.

Q. Do people come in very often and ask for ring ensembles under the trade-mark "Wed-Lok"?

A. We are getting queries every week on it.

Q. Do you ever have any customers come into your store and ask for lock ring ensembles?

A. Yes, we do.

Q. Does that happen very often?

Mr. Naylor: Same objection; on the ground that the word "lock" has no bearing on any issue in this case, no right being asserted in it per se.

Mr. Hursh: Go ahead and answer the question.

(Last question read.)

A. We are getting more requests all the time.

Q. What quality of merchandise is produced by Granat Bros.?

A. I think they are in a class by themselves. That is my opinion, anyway.

Q. Is this quality that you speak of applicable to Wed-Lok ring ensembles?

A. It is, sir.

Q. Have you ever been offered a Feature Lock ring ensemble? [11]

A. Yes, I have.

Q. Who offered this ensemble to you?

A. Well, through a jobbing house. I just couldn't tell you right at this time.

Q. Do you know what jobbing house it was?

Plaintiff's Exhibit K3—(Continued)

(Deposition of Holly G. Jackson.)

A. I think it was M. Schussler in San Francisco.

Q. Did you ever see the Feature Lock ring ensemble? A. I have, sir.

Q. And what is the quality of the Feature Ring ensemble as compared to the Granat Bros. Wed-Lok ensemble?

Mr. Naylor: That is objected to as calling for the opinion and conclusion of this witness, having no bearing on the issues of the case.

Mr. Hursh: The witness is one that has been in the jewelry business for many years and is certainly capable of determining the quality of jewelry, and it is a proper question to ask of the witness.

A. Well, I bought two or three of these sets so I could have them as a comparison.

Q. You have them still here in your store?

A. I have them still here, and I show them.

Q. What would you say as to the actual comparison of these Feature Lock ring ensembles as compared with the Wed-Lok ring ensembles? [12]

Mr. Naylor: Same objection.

A. Well, to me the Feature Lock looks like just a bunch of old rings that we have had for years equipped with this lock inserted into it. And as far as the style, why, I think they are about ten years behind the times. That is my own personal opinion.

Mr. Hursh: No further direct examination.

Plaintiff's Exhibit K3—(Continued)
(Deposition of Holly G. Jackson.)
Cross-Examination

By Mr. Naylor:

Q. How were the Feature Locks that you purchased for comparison purposes marked, Mr. Jackson?

A. I would not be able to answer that. I would have to get one and look at it.

Q. Will you get one, please?

A. Yes. (Examine ring.) This has "14 carat, Pat. F. L." in it.

Q. Am I correct in my understanding that you took that out of your window, your display window, facing on Liberty Street? A. Yes, I did, sir.

Q. In what sort of a display stand was that ring, please? A. Just in a plain little box.

Q. With no mark? A. No mark.

Q. Do you have any Wed-Lok rings on display in that same window? [13]

A. I imagine I have.

Q. At this time? A. I imagine I have.

Q. Is there any visible sign held forth to the public as to the brand "Wed-Lok" in connection with the display of those rings?

A. Shall I go and look?

Q. Yes, please.

A. (The witness inspected his display case.) I have my Wed-Lok Threesomes in there.

Q. What is the nature of the display case?

Plaintiff's Exhibit K3—(Continued)
(Deposition of Holly G. Jackson.)

A. A box.

Mr. Hursh: Make a note in the record that we have just examined the window and find that there are two Threesome ring ensembles in the window that are encased in a box showing the trade-mark "Wed-Lok." Mr. Jackson, does that have "Wed-Lok Threesome" on there? A. That is right.

Mr. Hursh: Wed-Lok Threesome.

Mr. Naylor: Let the record also show that there are approximately forty other boxes or more in that window with the words "Art Carved" featured on a substantial number of them.

Q. Mr. Jackson, to clarify the statement by counsel, can you state why there are only two boxes of Wed-Lok ensembles? [14]

A. That is a point I was going to bring up. I probably have as many Wed-Lok sets in my window —let's put it this way: I probably have fifteen more sets which I don't have boxes available for. They are bringing out a new box and I don't have it. I had to put them in my own boxes.

Mr. Hursh: So, as a matter of fact, there are approximately seventeen sets of Wed-Lok rings in your window and on display today?

A. I would say that.

Q. (By Mr. Naylor): And only two of them marked?

A. That is right. The rings are all marked but they are not in a box.

Plaintiff's Exhibit K3—(Continued)

(Deposition of Holly G. Jackson.)

Q. I mean a marked box. A. That is right.

Q. That is, marked so that the public could read it as they pass your window?

A. That is right.

Q. How many sets would you say had been purchased by you; that is, sets of Wed-Lok, in the year in which you have handled the Granat Bros. line?

A. I haven't made a check of that, sir. I wouldn't know.

Q. Could you give a rough estimate or could you make a check conveniently?

A. No, I couldn't.

Q. Could you tell us in round numbers what the set number [15] would be?

A. Well, I know how many dollars worth of Granat rings we sold, but I couldn't tell you how many of them were Wed-Loks. I will frankly say that.

Q. You say you have seventeen sets of Wed-Loks on hand at this time? A. Right close to it.

Q. Would you say you had sold 75 in the year that you have handled that particular line? I am speaking now of Wed-Loks specifically?

A. No, I wouldn't say that.

Q. Would you say 50?

A. That would be about one a week. I imagine I have, yes.

Q. In the neighborhood of 50?

A. I imagine I have, yes.

Plaintiff's Exhibit K3—(Continued)

(Deposition of Holly G. Jackson.)

Q. Now, earlier in your testimony you mentioned that you had heard of Granat Bros. Wed-Lok for about five years? A. That is right, sir.

Q. How did it first come to your attention?

A. Well, I had friends that have had the line to start with, and I had opened up my store, and naturally I was looking for something to sell.

Q. When did you open the store?

A. It will be five years the first of August.

Q. Did you have any contact with Granat Bros. at the time or [16] about the time you opened this store concerning their merchandise?

A. Not at the time, but some few months later. I don't know just what time it was.

Q. Would that have been about four and a half years ago? A. It wasn't quite that long ago.

Q. Do you know whether or not Granat Bros. were making Wed-Lok rings four and a half years ago? A. I do, sir.

Q. What is your understanding about that? That they were or were not making rings?

A. They were making them.

Q. They were? A. Yes.

Q. How do you know that?

A. Well, I have been in the business 27 years, and I always more or less hoped when I had a store of my own that I would handle Granat rings. I happen to like Granat rings.

Q. Did you make any effort four and a half

Plaintiff's Exhibit K3—(Continued)

(Deposition of Holly G. Jackson.)

years ago to procure Wed-Lok rings from Granat Bros.?

A. Well, I understood at that time they were not available.

Q. Then they were not making them, were they?

A. I couldn't say that. A lot of our rings were not made because of a shortage of men and material; like you could not get platinum, for one thing. A lot of rings were discontinued [17] during the war because they could not make a ring of the quality, for instance, that they wanted, and rather than make them they discontinued it during the war, like some of our silver patterns.

Q. It is a fact that Granat discontinued from 1941 to May of 1947, isn't it?

Mr. Hursh: Wait a minute. I object to that question. You are evidently quoting from something. The witness has stated that he didn't know exactly what the situation was with respect to Granat, and he just testified that some things were difficult to get because of the war conditions, and I don't think it is proper cross-examination, and I object to the question as irrelevant, immaterial and incompetent.

Mr. Naylor: Let's put it this way: When were you first able after you opened this store, Mr. Jackson, to procure Wed-Lok rings, thus marked, from Granat Bros.?

A. About a year ago at this time.

Plaintiff's Exhibit K3—(Continued)
(Deposition of Holly G. Jackson.)

Q. That would be, say, February, 1948?

A. I imagine so, yes. I would have to check my records, but I would say about a year.

Q. Did you try to procure them in the year 1947?

A. Please?

Q. Did you try to procure them in the year 1947?

A. I couldn't answer that. I am just not sure.

Q. Were you called on by a Granat Bros. salesman in the year [18] 1947?

A. He was in here. I couldn't tell you the exact date, but he was in here. He called at my store.

Q. During the year 1947?

A. I believe he did; yes, sir.

Q. Were you able to procure from him at that time Wed-Lok ensembles?

A. I understood at that time I couldn't get them.

Q. In 1947?

A. That is right; but as soon as they were available I was going to have them.

Q. As far as you know, they were first available to you in January of 1948?

A. That is right, sir.

Q. Now, coming back to your acquaintanceship with Wed-Lok rings four and a half years ago, how did it come to your attention that Granat Bros. were supposed to have made Wed-Lok rings that far back?

A. Well, I heard of the Wed-Lok ring many times before that, if you want to get technical about it.

Plaintiff's Exhibit K3—(Continued)

(Deposition of Holly G. Jackson.)

Q. How far back?

A. I wouldn't say that. I just don't know how long, but I have heard of them—as a matter of fact, we sold Granat rings when I was with Pomeroy & King.

Q. Where was that? [19]

A. Right here in Salem. We had their mountings.

Q. In Salem?

A. Pomeroy & King. However, they were not Wed-Lok. Understand that.

Q. They were not Wed-Lok? A. No, sir.

Q. Now, speaking specifically of Wed-Lok, how far back can you tell us about that?

A. Well, I can't answer that. I was in the service for two years and during that time, why——

Q. Naturally you were not buying any rings.

A. I wasn't thinking about jewelry. I will say this: I have known of Wed-Lok rings for several years.

Q. What do you mean by several years?

A. Oh, probably six or seven years. I don't know how long they have been making them, but I know I have known about them for many years.

Q. You can't fix the precise time?

A. Please?

Q. You can't fix the precise time for that, can you? In other words, how did they come to your attention?

A. I heard about them before I went in the

Plaintiff's Exhibit K3—(Continued)
(Deposition of Holly G. Jackson.)

service. I will say that. That was in 1942, I think it was.

Q. I think you mentioned that when you first heard of Feature Lock you thought it was another Granat Bros. ring. Was that [20] your testimony?

A. That is right.

Q. What led you to that belief? What was there in the expression "Feature Lock" that led you to think that it was another Granat Bros. ring?

Q. Well, when I heard the word "Lock" all I had ever heard of was Wed-Lok, so naturally I thought it was a Granat ring.

Q. Did you ever hear of J. F. Sturdy's Sons Company of Attleboro Falls, Massachusetts?

A. I guess I haven't.

Q. Has it ever come to your attention that they use the expression "Sta-Lokt"?

A. I have never heard of it.

Q. In connection with cuff buttons, made wholly or in part of precious metal?

A. Never heard of it that I know of.

Q. If you saw the expression "Sta-Lokt" on jewelry would you get the impression that that product also originated with Granat Bros.?

A. Inasmuch as I have never heard of "Lock" before, I might.

Q. Have you ever heard of Untermeyer, Robbins & Company of New York City?

A. I never have, sir.

Plaintiff's Exhibit K3—(Continued)

(Deposition of Holly G. Jackson.)

Q. Has it ever come to your attention that they use the expression "Locked in Love" for finger rings? [21] A. I have never seen it.

Q. If you were to see the expression "Locked in Love" applied to finger rings would you gain the impression that it was a Granat Bros. product?

A. Can I have anything off the record? Do you have to put this on the record?

Mr. Hursh: Pardon?

The Witness: May I ask a question?

Mr. Hursh: You may ask a question any time for clarification.

Mr. Naylor: Sure; any time, Mr. Jackson.

Mr. Hursh: Any time you don't understand a question you ask to have it clarified.

The Witness: That is what I want to know. You guys get me so full of goose pimples I don't know where I am at.

Mr. Naylor: That is not our purpose here.

The Witness: No, definitely not. I can see that. What was the question again?

(Last question read.)

A. Well, up until here recently, why, I had always been under the impression that any locked ring was a Granat ring, until I got these Feature Locks here.

Q. (By Mr. Naylor): That was because Wed-Lok was the only locking ring that you had personally heard of, wasn't it?

Plaintiff's Exhibit K3—(Continued)
(Deposition of Holly G. Jackson.)

A. That is the only ring I had ever sold in a locking ring. [22]

Q. You hadn't heard of any other lock ring?

A. Please?

Q. You had not heard of any other rings which included the word "Lock" or had a lock feature?

A. I believe they are the first I had heard of. However, I had had customers coming in and asking me about different lock rings, which I didn't know about until this all come up here recently.

Q. Could you give us an example of what they asked for?

A. They were asking for a lock ring. When I would show them these Granat rings they would say, "No, there is one that locks different than this," which I didn't know about at that time.

Q. How long ago was that, Mr. Jackson?

A. Oh, that was about—it is within the last year.

Q. Did they mention the brand name?

A. No, they just didn't know. They just said they locked different than these Granat rings. That is the first that I noticed of it.

Q. Did you ever hear of the Gemex Company?

A. I have, sir.

Q. Of Newark, New Jersey?

A. I don't know what their address is, but I have heard of them.

Q. Has it ever come to your attention that on

Plaintiff's Exhibit K3—(Continued)

(Deposition of Holly G. Jackson.)

their line of [23] jewelry, including finger rings, they have used the expression "Turn-Lok"?

A. I didn't know Gemex made a ring line.

Q. Has it ever come to your attention that the Gemex Company was putting out a line of jewelry, namely, bracelet attachments such as buckles or clasps, with the word "Gem-Lok" applied thereto?

A. I can find out. What do you call that right there (exhibiting tray of watch bands to counsel)?

Q. You have shown me a tray of what appears to be watch bracelets or wrist bands.

A. It doesn't mention any lock on it, does it?

Q. I agree with you that the word "Gem-Lok" does not appear. But what appears is "A Forstner product," and the top one on the left has in combination with the words "The perfect Buckle" "Kwik-Lok."

A. I have sold lots of them. That is the first time I have ever seen that.

Q. If you saw a "Kwik-Lok" line of jewelry would you take it for granted that it came from Granat Bros.?

Mr. Hursh: I object to that question as being indefinite, and you do not specify the particular type of jewelry that you are mentioning, and without asking the character of jewelry that such a trade-mark would be applied to the question is indefinite and unintelligible. [24]

Q. (By Mr. Naylor): With whom do you do

Plaintiff's Exhibit K3—(Continued)
(Deposition of Holly G. Jackson.)

business down there? Granat Bros. or Granat Manufacturing Company?

A. I do business with both of them.

Q. Doesn't Granat Manufacturing Company handle a wholesale line for Granat Bros.?

A. That is right.

Q. And I presume you send your orders to Granat Manufacturing Company?

A. That is right.

Q. Your correspondence is had with whom in Granat Manufacturing Company? Mr. Weinroth?

A. Yes, Mr. Weinroth.

Mr. Naylor: I think that is all.

Redirect Examination

By Mr. Hursh:

Q. Could you estimate how many wedding ring-engagement ring sets you sell a week in your store, the average?

A. That depends on the time of the year.

Q. I mean over the year how many would it average, would you say?

A. Well, let's set it at three a week.

Q. In this Feature Lock ensemble that you have produced, did these diamonds come set in the rings or are these dimaonds that you have yourself set in the rings?

A. I bought the mountings and that happens to

Plaintiff's Exhibit K3—(Continued)

(Deposition of Holly G. Jackson.)

be my own [25] stone, center stone, as I remember it. Yes, that is my own center stone.

Mr. Hursh: No further redirect.

Mr. Naylor: No further cross-examination.

Mr. Hursh: Will you stipulate that Mr. Jackson need not sign the deposition?

Mr. Naylor: Yes.

Mr. Hursh: And Mr. Jackson, are you willing to waive the reading and signing of your deposition?

The Witness: I will waive the reading and signing of the deposition.

(Witness excused.)

(Reading and signature waived.)

[Endorsed]: Filed Mar. 16, 1949. [26]

Certificate of Notary

United States of America,
State of Oregon, County of Multnomah—ss.

I, the undersigned, a Notary Public for Oregon, residing at Portland, Multnomah County, do hereby certify that on Monday, February 7, 1949, before me as such Notary, at 225 North Liberty Street, Salem, Oregon, personally appeared, pursuant to Notice of Taking Depositions filed with the deposition of Moritz Jacoby, a copy of which notice is hereto annexed, and the oral stipulations of counsel hereinbefore set forth, Holly G. Jackson, a witness

Plaintiff's Exhibit K3—(Continued)

in behalf of the plaintiff herein; that Mr. Jack E. Hursh, of attorneys for the plaintiff, appeared in its behalf, and Mr. James M. Naylor, of attorneys for the defendants, appeared in their behalf; and the said witness being by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, and being carefully examined, in answer to oral interrogatories propounded by the attorneys above named on direct and cross-examination testified as in the foregoing annexed deposition, pages 1 to 26, both inclusive, set forth.

I further certify that all interrogatories propounded to said witness, together with the answers of said witness thereto, and all objections and motions taken or made, and other proceedings occurring upon the taking of said deposition, [27] were then and there taken down by me in shorthand and thereafter reduced to typewriting, and that the foregoing transcript, pages 1 to 26, both inclusive, constitutes a full, true and accurate transcript of said deposition and proceedings, so taken by me in shorthand as aforesaid; and that the submission of said deposition, when transcribed, to the witness for examination and reading to or by him and opportunity to the witness to make any changes in form or substance and the signing of same by the witness were waived; and that said deposition has been retained by me for the purpose of sealing up and directing to the Clerk of the above-entitled court, as required by law.

Plaintiff's Exhibit K3—(Continued)

I further certify that I am not a relative or employee or attorney or counsel for any of the parties, or a relative or employee of such attorney or counsel, or financially interested in the said actions.

In Witness Whereof, I have hereunto set my hand and notarial seal at Portland, Oregon, this 10th day of February, 1949.

/s/ JOHN S. BECKWITH,

Notary Public for Oregon, residing at Portland, Multnomah County, Oregon.

My commission expires May 31, 1950. [28]

[Endorsed]: Filed Mar. 16, 1949.

[Title of District Court and Causes.]

PLAINTIFF'S EXHIBIT L3

Be It Remembered That, pursuant to the Notice of Taking Depositions attached to the deposition of Moritz Jacoby and filed with said deposition, a copy of which notice is hereto annexed, and the further oral stipulations of counsel appearing in behalf of the respective parties hereinafter set forth, the deposition of Leonard B. Goldblatt was taken in behalf of the plaintiff in the above-entitled actions on Monday, February 7, 1949, beginning at the hour of 3:00 o'clock p.m. at 399 State Street, Salem, Oregon, before John S. Beckwith, a Notary Public for Oregon, residing at Portland, Multnomah County, Oregon.

Appearances:

JACK E. HURSH,
Appearing for Messrs. Mellin and Hanscom,
391 Sutter Street,
San Francisco, California,
Attorneys for the plaintiff.

JAMES M. NAYLOR,
Russ Building,
San Francisco, California,
Appearing for John Vaughan Groner,
Of attorneys for the defendants.

Plaintiff's Exhibit L3—(Continued)

(At said time and place the following stipulation was entered into between counsel present in behalf of the respective parties:)

It is stipulated and agreed by and between the attorneys for the respective parties in the above-entitled actions that the deposition of Leonard E. Goldblatt may be taken on behalf of the plaintiff in the above-entitled actions, [2] at 399 State Street, Salem, Oregon, at the hour of 3:00 o'clock p.m., before John S. Beckwith, a Notary Public for Oregon, and in shorthand by the said John S. Beckwith.

It is further stipulated that said deposition, when fully transcribed, may be used on the trial of the actions above-mentioned as by law provided; that all objections as to the form of the questions are waived unless made at the time the questions are asked, and that all objections as to the materiality, relevancy and competency of the questions or answers are reserved to the parties until the time of trial.

It is further stipulated that the submission of the deposition, when fully transcribed, to the witness for examination and reading to or by him and opportunity to the witness to make any changes in form or substance and the signing of same by the witness are hereby expressly waived.

It is further stipulated that John S. Beckwith, in accordance with the Oregon statute, is authorized to administer oaths throughout the State of Oregon.

Plaintiff's Exhibit L3—(Continued)

LEONARD B. GOLDBLATT

was thereupon produced as a witness in behalf of the plaintiff and, having been first duly sworn by the Notary, was examined and testified as follows:

Direct Examination [3]

By Mr. Hursh:

Q. Will you state your name?

A. Leonard B. Goldblatt.

Q. Where do you reside?

A. Salem, Oregon.

Q. What is your occupation?

A. Jeweler.

Q. How long have you been so engaged?

A. The last 33 years.

Q. Do you know a firm of manufacturing jewelers by the name of Granat Bros.? A. I do.

Q. Can you state where that firm is located?

A. San Francisco, California.

Q. How long have you known of this company, Granat Bros.?

A. Well, there is a little confusion there. I knew of them as Granat Bros. and L. A. Giacobbi & Company since about 1916.

Q. Do you know the type of merchandise that Granat Bros. manufactures and sells?

A. They manufacture rings and watch cases.

Q. Have you ever heard of the trade-mark "Wed-Lok"? A. I have.

Plaintiff's Exhibit L3—(Continued)

(Deposition of Leonard B. Goldblatt.)

Q. Employed to identify wedding ring and engagement ring ensembles?

A. Wedding rings and engagement rings both.

Q. And whose ring ensembles are sold under this trade-mark "Wed-Lok"? A. Granat Bros.

Q. How long have you known of the use of the trade-mark "Wed-Lok" in connection with ring ensembles?

A. Oh, about the last twelve to fourteen years.

Q. Do you sell Wed-Lok ring ensembles in your store? A. Yes, sir; we do.

Q. How long have you been selling Wed-Lok ring ensembles?

A. For the past two and a half to three years.

Q. When the word "lock," either spelled l-o-k or l-o-c-k is employed to identify wedding ring-engagement ring ensembles, whose rings do you identify?

Mr. Naylor: Just a moment. Let's hear the question.

(Last question read.)

Mr. Hursh: Let me add "by that trade-mark."

Mr. Naylor: That is objected to as stating a hypothetical situation, since it is not shown on this record that anyone identifies anything by the word "lock," spelled either l-o-k or l-o-c-k; and on the further ground that it is incompetent and irrelevant and beyond the issues of this case, and would call for the conclusion of this witness.

Plaintiff's Exhibit L3—(Continued)
(Deposition of Leonard B. Goldblatt.)

Mr. Hursh: You may go ahead and answer.

The Witness: Would you read the question again?

(Last question re-read.) [5]

A. I would identify them as a Granat Bros. product.

Q. Do you know the type or quality of merchandise that is sold by Granat Bros.?

A. Yes, sir; very high quality merchandise.

Q. Are the Wed-Lok ring ensembles of the same quality?

A. They are of the very finest quality.

Q. Can you tell us what reputation Granat Bros. enjoy in the Salem area?

A. The very best quality of merchandise.

Q. By the way, Salem is the capitol of the State of Oregon, is it not? A. It is.

Q. Have you ever advertised Wed-Lok ring ensembles? A. Yes, we have.

Q. What type of advertising do you employ for this purpose? A. Newspaper.

Q. Do you have any of those newspaper ads?

A. Yes, sir.

Q. You have produced a number of newspaper ads. The first one is dated February 29, 1948, in the Statesman, Salem, Oregon, said newspaper being a Sunday newspaper. On page 5 is an advertisement of Hartman Brothers advertising your

Plaintiff's Exhibit L3—(Continued)

(Deposition of Leonard B. Goldblatt.)

appointment as the authorized distributors of Wed-Lok by Granat. Was that ad placed in the Salem Statesman by your company? [6]

A. Yes, sir.

Q. And it advertises Wed-Lok wedding ring and engagement ring ensembles? A. Yes, sir.

Mr. Hursh: I will introduce that as Exhibit 1. May it be stipulated that photostatic copies of these exhibits may be substituted?

Mr. Naylor: Yes.

(The advertisement referred to, dated February 29, 1948, was thereupon marked as Plaintiff's Exhibit 1, and a photostatic copy thereof is made a part of this deposition.)

Mr. Hursh: The next ad is for Sunday, March 14, 1948, in the Statesman, Salem, Oregon, and I see an advertisement for Wed-Lok diamond rings. Could you state whether your company placed that advertisement in the Statesman on Sunday, March 14th, 1948? A. Yes, sir; we did.

Mr. Hursh: I introduce that advertisement as Exhibit 2.

(The advertisement referred to, dated March 14, 1948, was thereupon marked as Plaintiff's Exhibit 2, and a photostatic copy thereof is made a part of this deposition.)

Mr. Hursh: Another ad dated April 11, 1948, appearing in the Statesman, Salem, Oregon. I will

Plaintiff's Exhibit L3—(Continued)
(Deposition of Leonard B. Goldblatt.)

ask if your company [7] inserted that advertisement in the paper on April the 3rd, 1948?

A. Yes, sir; we did.

Mr. Hursh: I will introduce that advertisement as Exhibit 3.

(The advertisement referred to, dated April 3, 1948, was thereupon marked as Plaintiff's Exhibit 3, and a photostatic copy thereof is made a part of this deposition.)

Mr. Hursh: Another ad dated October 3, 1948, in the Statesman, Salem, Oregon, where you feature Wed-Lok diamond rings by Granat. Did your company insert that ad in the paper on October 3rd, 1948?

A. Yes, sir.

Mr. Hursh: I will introduce that.

Mr. Naylor: That ad and all ads subsequent to August 3rd, 1948, are objected to as pertaining to occurrences after the commencement of this action.

Mr. Hursh: I will introduce the advertisement of October 3rd, 1948, as Exhibit 4.

(The advertisement referred to, dated October 3, 1948, was thereupon marked as Plaintiff's Exhibit 4, and a photostatic copy thereof is made a part of this deposition.)

Mr. Hursh: On October 10, 1948, you placed an ad in the [8] Statesman, Salem, Oregon. Will you

Plaintiff's Exhibit L3—(Continued)

(Deposition of Leonard B. Goldblatt.)

tell me whether this ad featuring Wed-Lok Threesomes was inserted by your company?

A. Yes, sir; it was.

Q. And I notice you have in this ad a matching groom's ring. What trade-mark is that ring sold under by you?

A. Under the name of Wed-Lok.

Q. Does that groom's ring have any means for locking it in engagement with any other ring?

A. No, sir; it is not a locking ring.

Q. It is just a plain man's wedding ring?

A. A plain man's wedding ring, worn alone.

Mr. Hursh: I introduce that advertisement in evidence as Exhibit 5.

(The advertisement referred to, dated October 10, 1948, was thereupon marked as Plaintiff's Exhibit 5, and a photostatic copy thereof is made a part of this deposition.)

Mr. Naylor: The same objection as to Exhibit 4, and may I have a stipulation that this objection will run to all ads subsequent to August 3, 1948?

Mr. Hursh: So stipulated.

Q. The next advertisement appearing in The Statesman, Salem, Oregon, is October 24, 1948, showing Wed-Lok diamond rings by Granat. Did your company place that advertisement in the paper on that date? [9] A. Yes, sir.

Mr. Hursh: I introduce that as Exhibit 6.

Plaintiff's Exhibit L3—(Continued)

(Deposition of Leonard B. Goldblatt.)

(The advertisement referred to, dated October 24, 1948, was thereupon marked as Plaintiff's Exhibit 6, and a photostatic copy thereof is made a part of this deposition.)

Q. (By Mr. Hursh): I see an ad that was inserted in The Statesman, Salem, Oregon, Sunday, November 28, 1948, featuring Wed-Lok diamond rings by Granat. Did your company insert that advertisement in the newspaper?

A. Yes, sir.

Q. On the date of November 28, 1948?

A. November 28, 1948.

Mr. Hursh: I introduce that in evidence as Exhibit 7.

(The advertisement referred to, dated November 28, 1948, was thereupon marked as Plaintiff's Exhibit 7, and a photostatic copy thereof is made a part of this deposition.)

Mr. Hursh: You have produced another advertisement dated January 2nd, 1949, in The Statesman, Salem, Oregon, again featuring Wed-Lok diamond rings by Granat. Was that advertisement placed in the newspaper by your company?

A. It was, sir.

Q. On January 2nd, 1949?

A. On January 2nd, 1949. [10]

Mr. Hursh: I will introduce that advertisement as Exhibit 8.

Plaintiff's Exhibit L3—(Continued)
(Deposition of Leonard B. Goldblatt.)

(The advertisement referred to, dated January 2, 1949, was thereupon marked as Plaintiff's Exhibit 8, and a photostatic copy thereof is made a part of this deposition.)

Mr. Hursh: You have another advertisement dated January 16, 1949, that appears in The Statesman, Salem, Oregon, on Sunday. Can you state whether or not that advertisement was introduced or placed in the newspaper by your company?

A. It was.

Mr. Hursh: I will introduce that as Exhibit 9.

(The advertisement referred to, dated January 16, 1949, was thereupon marked as Plaintiff's Exhibit 9, and a photostatic copy thereof is made a part of this deposition.)

Q. (By Mr. Hursh): I notice, Mr. Goldblatt, that in all of your advertisements you mention that these are Wed-Lok rings by Granat.

A. Yes, sir.

Q. Does that appear in all of your ads?

A. Yes, sir; it does.

Q. Is that your customary practice when advertising your Wed-Lok rings to mention that they are a Granat product? A. Yes, sir. [11]

Q. How often do you advertise Wed-Lok rings in the newspaper?

A. We average about one advertisement a month throughout the year. At certain times of the year

Plaintiff's Exhibit L3—(Continued)
(Deposition of Leonard B. Goldblatt.)

we advertise a little heavier than we do at other times.

Q. Those are advertisements that feature the Wed-Lok ring ensemble?

A. I am referring to Wed-Lok advertisements.

Q. Can you state approximately what percentage of your total engagement ring and wedding ring business comprises the Wed-Lok ensembles?

A. Well, we refer to the entire Granat Bros. series as Wed-Lok rings. All of the rings do not lock. If the customer does not particularly want a locking ring, a wedding ring or a man's matching wedding ring, we call them all the Wed-Lok series. And I would say that over 50 per cent of our business is in the Granat Bros. rings.

Q. I noticed in your window at the front of your store that you have quite a display of Wed-Lok rings. Do you customarily so advertise the Wed-Lok rings in your store by placing displays in the window? A. We do.

Q. Have you ever heard of the trade-mark "Feature Lock" applied to wedding ring-engagement ring ensembles? A. Yes, I have.

Q. When you first heard of this Feature Lock wedding ring-engagement [12] ring ensemble, what was your reaction?

Mr. Naylor: That is objected to as calling for the opinion and conclusion of this witness. It could not have any possible bearing on the outcome of the case.

Plaintiff's Exhibit L3—(Continued)

(Deposition of Leonard B. Goldblatt.)

Mr. Hursh: For the record, I am just asking Mr. Goldblatt to give his personal reaction to the use of the name "Feature Lock" when he first saw or heard of this trade-mark, and that definitely is important in the case.

The Witness: What was the question?

(Last question read.)

A. Well, in my opinion, it was another product of Granat Bros., put out with a trifle different name so as to open other accounts than they had opened on the Wed-Lok, as they had more or less restricted their accounts to a certain extent on Wed-Lok, and only opened a few select jewelers on the Wed-Lok trade-mark.

Q. Were you confused at that time as to the identity of the manufacturer of the Feature Lock ensembles?

A. I was. In fact, to the best of my recollection I asked the party who presented the rings to me if they were made by Granat Manufacturing Company and he assured me that they were not.

Q. Who showed you the Feature Lock ring ensemble the first time?

A. Well, to the best of my knowledge, it was a representative [13] of the S. H. Friend Company, although several houses had shown them to me, and it is possible that some other house had shown them to me prior to that.

Plaintiff's Exhibit L3—(Continued)

(Deposition of Leonard B. Goldblatt.)

Q. How long ago was that, would you state?

A. It was approximately a year or maybe a little over.

Q. Would you state whether or not the word "lock" is an important and valuable part of the trade-mark "Wed-Lok" as employed by you on wedding ring-engagement ring ensembles?

Mr. Naylor: Just a moment. That is objected to as calling for an opinion and conclusion of this witness, as to the significance of a word which is not in issue in this case since it is not maintained that anybody has ever used the word l-o-c-k or l-o-k per se as a trade-mark or a mark for anything.

The Witness: What was the question?

(Last question read.)

A. Well, it would be to us for the reason that a great many of our customers come in and designate or call for a ring as a lock type ring or a lock together ring, and to us it means the Granat Wed-Lok.

Q. (By Mr. Hursh): Do you ever have customers come into your store and ask for Wed-Lok ring ensembles by that trade-mark, designating the rings by that trade-mark? A. Oh, yes.

Mr. Naylor: That is objected to as calling for hearsay [14] in that it is assuming that customers have done this and is not calling for the best evidence. If there are such customers, let's have them produced.

Plaintiff's Exhibit L3—(Continued)

(Deposition of Leonard B. Goldblatt.)

Q. (By Mr. Hursh): Have your customers personally come in and asked you for Wed-Lok ring ensembles? A. Yes, sir.

Q. How often does this occur?

A. Oh, I would say two to three times a month.

Q. Did you ever have customers come into your store that you have personally served and ask for lock ring ensembles? A. Yes, sir.

Mr. Naylor: Will you repeat that question?

(Last question read.)

Q. (By Mr. Hursh): Do you know what quality of merchandise Granat Bros. manufactures and sells?

A. It is considered one of the fine quality brands on the market.

Q. Would you state whether or not the Wed-Lok rings are of the same quality?

A. Yes, sir; of very high grade quality.

Q. At the time you were offered Feature Lock ensembles did you actually see the ring ensemble that was offered to you? A. Yes, sir.

Q. Would you compare the quality of the Feature Lock ring [15] ensemble with that of the Wed-Lok ring ensemble sold by Granat Bros.?

Mr. Naylor: Is the question "Did you compare the quality" or "Would you"?

(The last question was read.)

Plaintiff's Exhibit L3—(Continued)

(Deposition of Leonard B. Goldblatt.)

Mr. Naylor: As to that we object as calling for the opinion and conclusion of this witness.

Mr. Hursh: This witness has been in the jewelry business for many years and is fully capable of examining jewelry and determining the exact quality of the jewelry merely by such an examination, and I think he has been qualified by this long experience in the jewelery business to give us a comparison of the two types of ring ensembles. Will you read the question.

(Last question read.)

A. In my opinion, the Feature Lock ensembles were not as fine quality or not as finely made merchandise, and any jeweler putting in the Feature Lock ring could buy the mountings alone and put in a much cheaper quality diamond than was used in the Wed-Lok ensembles.

Q. (By Mr. Hursh): Do the Wed-Lok ensembles come with the diamonds already mounted?

A. They do.

Mr. Hursh: No further questions. [16]

Cross-Examination

By Mr. Naylor:

Q. What does the word "lock" in connection with this class of merchandise signify to you, Mr. Goldblatt?

A. Well, the word "lock" itself designates rings that are held together.

Plaintiff's Exhibit L3—(Continued)

(Deposition of Leonard B. Goldblatt.)

Q. Does it denote or connote any particular type of holding device?

A. No, sir. That is, the word "lock"?

Q. The word "lock." Does it describe to you a snap button or snap fastener? A. No, sir.

Q. Does it denote to you two rings which may have a dove-tailed connection.

A. They could be locked together either in the head of the ring or the shank of the ring.

Q. It doesn't matter how they are locked, does it?

A. No.

Q. But the word "lock" still connotes to you or denotes to you that they are locked together in some way?

A. Correct, except the word "interlock," which we have also used. Do you call that a different word?

Q. What does that signify to you?

A. Well, that could signify the way we used to use it, on [17] a curved ring, where they were held together by the curve and not by an actual locking device.

Q. That is, by the contour of the ring surface; is that right? A. That is right.

Q. One abutting ring surface had a recess and the other had a protuberance or projection of some kind? A. Correct.

Q. And those were designed into the ring?

A. That is right. In fact, the first locking type

Plaintiff's Exhibit L3—(Continued)
(Deposition of Leonard B. Goldblatt.)

of ring that we had from Granat Bros. many years ago was what they termed an Interlock at that time.

Q. Interlock. What did that accomplish?

A. Well, it held the rings together; that is, the top part of the rings.

Q. It prevented rotative shifting, didn't it?

A. Correct.

Q. It did not prevent separation perpendicular to the axis of the rings at all, did it?

A. No, sir; it did not.

Q. So it was locked in one sense——

A. It was locked while on the finger, you might say.

Q. Now, what was there in the expression "Feature Lock" that led you to believe that the products had their origin [18] in Granat Bros.? Was it the word "Feature"?

A. No, it was the word "Lock."

Q. The word "Feature" had no significance to you at all in connection with Granat Bros., did it?

A. No, sir; the word "Feature" did not.

Q. And since you have given us your definition of the word "lock," why was it that the word "lock" as it appeared in Feature Lock conjured up the picture of Granat Bros. as a possible manufacturer?

A. Because of the fact that it has been done before in the trade: That they come out with a product and will advertise it and sell it to a certain number of accounts, and then open up with a com-

Plaintiff's Exhibit L3—(Continued)

(Deposition of Leonard B. Goldblatt.)

petitive line with a similar name or similar qualifications and sell it to a competitor.

Q. It may have been just the qualifications that you speak of that suggested the common origin; isn't that true?

A. The qualifications of the lock, you mean?

Q. The type of ring?

A. Yes; because of the fact it was another lock ring I figured out that Granat was possibly coming out with another locking ring to either sell to jobbers or to jewelers. Granat had formerly sold rings at times through jobbers, too.

Q. They had done that at one time, had they?

A. Yes, sir. It was jobbers that showed the rings.

Q. Whereas your purchases now are made directly from whom? [19]

A. From Granat Bros.

Q. Are you sure of that? Is it Granat Bros. or Granat Manufacturing Company?

A. Granat Manufacturing Company.

Q. Your business is done with Mr. Joe Weinroth, isn't it, or Mr. Giacobbi?

A. Not directly. Their representative in this territory is Howard Ball.

Q. Where is he from? A. Portland.

Q. Now, Mr. Hursh mentioned there was quite a display of Wed-Lok rings in the window. I could

Plaintiff's Exhibit L3—(Continued)
(Deposition of Leonard B. Goldblatt.)

only count three. Have you got more than three in the window at this time?

A. There is at least ten or twelve.

Q. How are they marked? A. In sets.

Q. How are they marked for reading by the passer-by who looks in the window?

A. There is one trade-mark "Wed-Lok," and the rest of them are surrounding this trade-mark in individual boxes with just price tags on them; no marking of it being a locked ring except the rings are locked together and put into one section.

Q. I observed three boxes marked "Threesome," with the word [20] "Threesome" alone in the inner cover of the top of the box. A. Yes, sir.

Q. That is true, isn't it?

A. Yes, sir. Those are Granat rings too.

Q. Are those Wed-Lok rings?

A. If you refer to the strict meaning of Wed-Lok, no; but we call them Wed-Lok. Any here that are not joined together, we refer to them as a product of Granat Manufacturing Compnay under the name of "Wed-Lok," the same as we sell their men's wedding rings as a Wed-Lok wedding ring to match the Wed-Lok ladies' rings.

Q. How are the men's wedding rings branded? Are they branded or stamped?

A. With the word "Wed-Lok" on the inside of the ring?

Q. Yes, sir. A. No, sir.

Plaintiff's Exhibit L3—(Continued)

(Deposition of Leonard B. Goldblatt.)

Q. Then are we to understand that it is merely your usage which has extended the term "Wed-Lok" to embrace the men's wedding rings?

A. Well, we have advertised them as Wed-Lok Threesomes, which refers to the men's wedding rings as part of the ensemble of Wed-Lok rings.

Q. For what period of time have you been getting boxes from Granat Manufacturing Company or Granat Bros. with the word "Threesome" alone, with no other word in the top of the [21] inside cover?

A. Oh, for the past year or year and a half, maybe.

Q. Now, you spoke of Wed-Lok merchandise amounting to approximately 50 per cent of your ring ensemble business? A. Yes, sir.

Q. Those were your figures, weren't they?

A. Of Wed-Lok, strictly in the Wed-Lok?

Q. Yes.

A. No, I referred to it as the Granat Bros. mountings in the Threesomes, that we also referred to as the Wed-Loks, and the men's wedding rings.

Q. Would you re-state the percentage, then, as it pertains to goods received by you from Granat Manufacturing Company or Granat Bros. marked with the trade-mark "Wed-Lok"?

A. That would refer to the lady's wedding ring and solitaire that are snapped together?

Q. That is right, sir.

Plaintiff's Exhibit L3—(Continued)
(Deposition of Leonard B. Goldblatt.)

A. That would possibly account for 25 per cent of our diamond sales.

Q. Twenty-five per cent? A. Yes, sir.

Q. Now, will you translate that into numbers of sets?

A. Oh, we have average for the last two years about a dozen Wed-Lok sets a month.

Q. A dozen a month? [22]

A. On an average; some months a little less; some months a little more.

Q. I notice that in each of the ads, Plaintiff's Exhibits 1 to 9, inclusive, the word "lock" is used to describe a characteristic of the ring. For example, will you examine No. 1 in that connection and see if you find in it the expression "locked together."

A. "They cannot slide out of position for they are locked together."

Q. You meant by that wording that the rings actually locked together, did you not?

A. Yes, sir.

Q. And will you examine No. 2, and see if a similar expression is employed?

A. "They cannot slide out of position for they are locked together."

Q. Now, just to save time, Mr. Goldblatt, will you please examine Exhibits 3 to 9, inclusive, and state whether or not it is a fact that the word "lock" or the expression "locked together" is used in each

Plaintiff's Exhibit L3—(Continued)

(Deposition of Leonard B. Goldblatt.)

of them to describe a characteristic of the connection of the rings.

A. The words "lock together" or "locked together" appear in every advertisement.

Q. When the representative offered you the Featur Lock merchandise did he exhibit the rings themselves? [23] A. Yes, sir.

Q. Was that here in your store in Salem?

A. Yes, sir.

Q. Did you examine the rings?

A. Yes, sir.

Q. Was there any mark of origin on the rings other than the words "Feature Lock"?

Mr. Hursh: I object to that question. He didn't state whether there was any mark of origin on the rings. You haven't asked the witness that. You attempt to state that the mark "Feature Lock" was on the ring, which has not been testified to by this witness. I think it is irrelevant, immaterial and incompetent.

Q. (By Mr. Naylor): In order to simplify that, you examined the rings, did you not, Mr. Goldblatt?

A. Yes, sir.

Q. What did you observe as to markings of any kind?

A. I didn't look for any markings. I looked at the lock.

Q. You didn't pay any attention to the markings?

Plaintiff's Exhibit L3—(Continued)
(Deposition of Leonard B. Goldblatt.)

A. No, sir. If I did, it skips my mind.

Q. Was it because the rings locked together that you surmised that they had origin in Granat Bros.?

A. Well, that and the combination of the name "Lock."

Q. Well, how did the combination with the name "Lock" in [24] it come into the conversation? Was it mentioned to you by the salesman?

A. The salesman that showed them to me said that it was his new locked together ring the same as Granat had in their line with a different type of lock.

Q. Did he mention the words "Feature Lock"?

A. I don't recall that he did. I asked him what they called it and he said a Feature Lock, which I understand at that time was spelled l-o-k instead of l-o-c-k.

Q. As I understand your testimony, you then and there asked him if this merchandise had been manufactured by Granat?

A. Oh, yes; I did.

Q. In that original conversation?

A. In our original conversation.

Q. As I understand your testimony, he assured you that it was not? A. That is right.

Q. Your confusion was rather short lived, wasn't it?

A. Well, it was when I first looked at it that I thought it was a Granat Bros. product, and I asked

Plaintiff's Exhibit L3—(Continued)

(Deposition of Leonard B. Goldblatt.)

him definitely if it was a Granat Bros. product and he assured me that it was not.

Q. How long did this conversation take?

A. Oh, we perhaps chatted for a half hour over the rings. [25]

Q. Now, I think you said that you have had knowledge of the Wed-Lok by Granat Bros. for twelve to fourteen years? A. Yes, sir.

Q. Did you have any knowledge of it during the war years? A. No, sir.

Q. Was it available to you during the war years?

A. No, sir.

Q. Did you make any effort to obtain merchandise during the war years? A. No, sir.

Q. Did any salesman call on you offering merchandise under Wed-Lok during the war years?

A. No, sir.

Q. When was it after the war years that the merchandise under Wed-Lok was first available to you?

A. About three years ago to this time.

Q. Would you fix a date? Can you fix a date on that for us?

A. As to the exact month, you mean?

Q. Approximately.

A. Oh, I would say it would possibly be in February or March of 1946. Young Giocobbi came up with it on that trip from San Francisco.

Q. Did you place an order with him at that time?

Plaintiff's Exhibit L3—(Continued)
(Deposition of Leonard B. Goldblatt.)

A. No, sir. [26]

Q. When did you first place your order after the war years? A. Around a year after that.

Q. And that would be approximately when in 1947?

A. I think our first shipment of Wed-Loks came in about April or May of 1947.

Q. April or May of 1947?

A. At that time young Mr. Giacobbi called on us again at that time at the special request of my brother, who was in the jewelry business in Tacoma, because on his first trip through here I had told him that I was too heavily stocked with Traub merchandise to put in the line, and suggested he call on my brother in Tacoma and he would sell the line which he did, and my brother put it in a year ahead of me. He had very good success with the Granat Manufacturing line and then he asked him to call on me again the following year.

Q. And then you commenced your business with them?

A. Correct; although previous to that, as far back as 1917 or '18, I had bought Granat Bros. merchandise from Joe Weinroth and in succeeding years.

Q. Did you purchase any Wed-Lok rings from Granat Bros. between the years, say, May of 1947 and December of 1940?

A. '47 and '40? Going backwards?

Plaintiff's Exhibit L3—(Continued)

(Deposition of Leonard B. Goldblatt.)

Q. Yes.

A. No, sir; I didn't purchase anything from the Granat [27] Manufacturing during that period.

Q. Are you aware of anybody in the jewelry business manufacturing interlocking wedding and engagement rings other than Granat and the Feature Lock Company?

A. Well, there are other lock rings on the market today, but I understand that they are put out under a different name and manufactured by the Feature Company.

Q. Have you heard of any rings in addition to those manufactured by Feature and Granat, locking rings?

A. I believe that Gomez Company in San Francisco have a locking ring that was shown to me by a Mr. Henderson. That was also a locking type ring, and I don't believe that was a Feature Lock product.

Mr. Naylor: I think that is all.

Redirect Examination

By Mr. Hursh:

Q. Mr. Goldblatt, during the war years did you have difficulty in obtaining Elgin watches?

A. Yes, sir.

Q. As a matter of fact, will you state whether or not you had difficulty in obtaining many lines of your merchandise during the war years?

Plaintiff's Exhibit L3—(Continued)
(Deposition of Leonard B. Goldblatt.)

A. There were a good many lines. Even plain yellow gold wedding rings were very hard to obtain. During that period we had to have some of the smaller shops manufacture them [28] specially for us in order to obtain them.

Q. What was the reason for the difficulty in obtaining merchandise during the war years, if you know?

A. Well, for one thing, there was more customers than there was merchandise, and a great many items that were well known went under the allotment basis and they were distributed out very meagerly to us. We had the exclusive Towle agency for sterling silver, and we could have sold twenty or thirty times the amount that the Towle Company was able to ship us on our allotment.

Q. So that the fact that Wed-Lok ring ensembles were not available to you was no different than the fact that many other types of merchandise you desired to sell were not available to you during this war period; is that correct?

A. That is correct.

Mr. Hursh: That is all.

Mr. Naylor: That is all.

Mr. Hursh: Jim, do you stipulate that the witness need not read and sign the deposition?

Mr. Naylor: Yes.

Plaintiff's Exhibit L3—(Continued)

(Deposition of Leonard B. Goldblatt.)

Mr. Hursh: Mr. Goldblatt, do you agree that it will not be necessary for you to read and sign your deposition?

The Witness: I do.

(Witness excused.)

(Reading and signature waived.) [29]

CERTIFICATE OF NOTARY

United States of America,
State of Oregon, County of Multnomah—ss.

I, the undersigned, a Notary Public for Oregon, residing at Portland, Multnomah County, do hereby certify that on Monday, February 7, 1949, before me as such Notary, at 399 State Street, Salem, Oregon, personally appeared, pursuant to Notice of Taking Depositions filed with the deposition of Moritz Jacoby, a copy of which notice is hereto annexed, and the oral stipulations of counsel hereinbefore set forth, Leonard B. Goldblatt, a witness in behalf of the plaintiff herein; that Mr. Jack E. Hursh, of attorneys for the plaintiff, appeared in its behalf, and Mr. James M. Naylor, of attorneys for the defendants, appeared in their behalf; and the said witness being by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, and being carefully examined, in answer to oral interrogatories propounded by the attorneys

Plaintiff's Exhibit L3—(Continued)

above named on direct and cross-examination testified as in the foregoing annexed deposition, pages 1 to 52, both inclusive, set forth.

I further certify that all interrogatories propounded to said witness, together with the answers of said witness thereto, and all objections and motions taken or made, and [30] other proceedings occurring upon the taking of said depositions, were then and there taken down by me in shorthand and thereafter reduced to typewriting, and that the foregoing transcript, pages 1 to 29, both inclusive, constitutes a full, true and accurate transcript of said deposition and proceedings, so taken by me in shorthand as aforesaid; and that the submission of said deposition, when transcribed, to the witness for examination and reading to or by him and opportunity to the witness to make any changes in form or substance and the signing of same by the witness were waived; and that said deposition has been retained by me for the purpose of sealing up and directing to the Clerk of the above-entitled court, as required by law.

I further certify that the photostatic copies of documents annexed hereto, numbered "1" to "9," both inclusive, are photostatic copies of the identical documents so marked as exhibits in behalf of the plaintiff upon the taking of said deposition.

I further certify that I am not a relative or employee or attorney or counsel for any of the parties,

Plaintiff's Exhibit L3—(Continued)

or a relative or employee of such attorney or counsel, or financially interested in the said action.

In Witness Whereof, I have hereunto set my hand and notarial seal at Portland, Oregon, this 10th day of February, 1949.

[Seal] /s/ JOHN S. BECKWITH,
Notary Public for Oregon, residing at Portland, Multnomah County.

My commission expires 5/30/50. [31]

[Endorsed]: Filed Mar. 16, 1949.

[Title of District Court and Causes.]

PLAINTIFF'S EXHIBIT M3

Deposition of Phil Kleiger

Deposition of Phil Kleiger, taken on behalf of the plaintiff, at 520 Equitable Building (adjourned to this location by stipulation of counsel from 912 Sixteenth Street), in the City and County of Denver, State of Colorado, at ten o'clock a.m., on the 9th day of February, 1949, before Harold N. Woodman, a notary public within and for the City and County of Denver, State of Colorado, pursuant to the annexed notice.

Appearances:

For the Plaintiff:
JACK E. HURSH, ESQ.,
MELLIN & HANSCOM.

For the Defendants:
JAMES M. NAYLOR, ESQ.,
NAYLOR & LASSAGNE,
JOHN VAUGHAN GRONER,
FISH, RICHARDSON & NEAVE,
New York.

Mr. Hursh: Is it stipulated that we may attach a copy of the original notice of this deposition in lieu of the original, which was attached to the depositions at Portland?

Mr. Naylor: It is so stipulated.

Mr. Hursh: And the usual stipulation will be

Plaintiff's Exhibit M3—(Continued)

(Deposition of Phil Kleiger.)

entered into that Mr. Woodman may take this deposition stenographically and transcribe it into typewritten form and then file it with the Clerk of the Court?

Mr. Naylor: That is right; reserving all objections [2] except to the form of the questions.

Mr. Hursh: That is correct, yes.

PHIL KLEIGER

a witness produced on behalf of the plaintiff, being first duly sworn to state the truth, the whole truth, and nothing but the truth, testified on his oath as follows:

Direct Examination

By Mr. Hursh:

Q. Will you state your name, please?

A. Phil Kleiger.

Q. What is your residence at present?

A. 400 Clermont Street.

Q. What is your occupation? A. Jeweler.

Q. How long have you been engaged in the jewelry business?

A. Approximately thirty to thirty-five years.

Q. How long have you been so engaged in Denver? A. All the time.

Q. Do you know of a company that manufactures jewelry by the name of Granat Brothers?

A. Yes.

Q. Do you know where that company is located?

Plaintiff's Exhibit M3—(Continued)
(Deposition of Phil Kleiger.)

A. San Francisco.

Q. What type of merchandise does Granat Brothers manufacture [3] and sell?

A. Wedding rings and mountings.

Q. Have you ever heard of a ring ensemble known as Wed-Lok ring ensemble?

A. Yes, I have.

Q. Who manufactures the ring ensemble and sells it under the name or trade-mark "Wed-Lok"?

A. Granat Brothers.

Q. How long have you known of the use of the trade-mark "Wed-Lok" in connection with ring ensembles?

A. I judge around twelve to thirteen years.

Q. Over that twelve or thirteen years whose products have been identified with the trade-mark "Wed-Lok"? A. Granat Brothers.

Q. To your knowledge, has that trade-mark "Wed-Lok" ever been used in connection with the products of any other manufacturers besides Granat Brothers? A. No, sir.

Q. When the word "Lok," either spelled "L-o-c-k" or "L-o-k," is used in connection with wedding ring or engagement ring ensembles, with whose products do you identify it?

A. Granat Brothers.

Q. In your opinion, is the word "Lok" or trade-mark "Wed-Lok" a valuable part of that trade-mark?

Plaintiff's Exhibit M3—(Continued)

(Deposition of Philip Kleiger.)

Mr. Naylor: That question is objected to as pertaining to matters wholly irrelevant and incompetent under [4] any issue in this case, and on the ground that it calls for a mere conclusion of this witness.

A. Yes, sir.

Q. Do you sell Granat Brothers products in your store? A. Yes, sir.

Q. What type of Granat Brothers products do you sell?

A. Wedding rings and mounted diamond rings, solitaires, ladies' mountings.

Q. Do you know what quality of merchandise Granat Brothers sells?

A. It is the very best quality.

Q. Would that apply to the Wed-Lok ring ensemble that you sell in your store? A. Yes.

Q. You have sold Wed-Lok rings in your store?

A. Yes, sir.

Q. In the sale of Wed-Lok rings in your store, would you say that the use of the word "Lok" in connection with the sale of those rings is a valuable part of the trade-mark "Wed-Lok"?

Mr. Naylor: That is objected to for the same reason, namely as pertaining to matter wholly without the issues of this case and as calling for the mere conclusion of this witness. A. Yes, sir.

Q. How long have you sold Granat Brothers products? [5]

Plaintiff's Exhibit M3—(Continued)

(Deposition of Philip Kleiger.)

A. Approximately twenty to twenty-five years.

Q. Over what period of time have you sold Wed-Lok ring ensembles?

A. I would say about twelve years.

Q. Have you any early records of your purchase and sale of Wed-Lok ring ensembles?

A. No, I don't retain records after six years.

Q. Is it your business custom to destroy records after a six-year period?

A. All records after six years.

Q. But you did purchase from Granat Brothers during the past twelve years Wed-Lok ring ensembles?

A. Yes, with the exception of during the war time.

Q. Did you sell those in your store as Wed-Lok ring ensembles? A. Yes, sir.

Q. Using that name "Wed-Lok" in the sale of the rings? A. Yes, sir.

Q. Do you advertise the sale of Wed-Lok rings in Denver? A. I do, yes, sir.

Q. What medium of advertising do you employ?

A. Radio, newspaper.

Q. How often do you advertise Wed-Lok ensembles in your radio program?

A. Well, I touch on it in most every program. I can't [6] say exactly. Most every program where I have diamond rings mentioned. I can't say exactly. There is no regular setup. At times, three

Plaintiff's Exhibit M3—(Continued)
(Deposition of Philip Kleiger.)

announcements a week. It might be that it would be twice a month that I mention Wed-Loks, or once a month. On most every program we have.

Q. But you have mentioned Wed-Lock ring ensembles consistently on your radio program?

A. I have, yes.

Q. What other medium of advertising did you say you employed? A. Newspapers.

Q. How often do you run your advertisements in the newspapers?

A. It averages once and sometimes two times a month, I would say.

Q. Do you in all this advertising feature the trade-name "Wed-Lok"? A. Yes.

Q. About how often would you say you featured Wed-Lok ring ensembles in your newspaper advertising?

Mr. Naylor: That is objected to as calling not for the best evidence. If there are newspaper advertisements, I think they ought to be produced.

A. There is, as I said, no regular setups; sometimes once a month, or twice a month. There is no definite setup as to that.

Q. Referring to your radio advertising, have you been [7] able to secure some of the scripts that you employed in your radio programs?

Plaintiff's Exhibit M3—(Continued)

(Deposition of Phil Kleiger.)

A. I secured those three folders this morning.

Q. You have produced three folders of radio script that are kept by whom? Who kept these folders of script?

A. The Niemann Advertising Agency.

(Conference.)

Q. In one of these books that you have just handed me I note a radio script dated August 20, 1947. Over what station was that broadcast?

A. KOA.

Q. Was that program broadcast over Radio Station KOA on August 20, 1947?

A. According to the records, it was, yes, sir.

Q. And these are the records of your company that are kept by your advertising agency?

A. Yes, sir.

Q. Does that advertising mention Wed-Lok rings? A. Yes, it does. Wed-Lok, yes.

Q. Will you read this one sentence that I am pointing to, into the record?

A. "It's Granat's new ring creation—'Wed-Lok.'"

Q. Read the next sentence.

A. "Imagine—two separate rings that click together, keeping them correctly aligned to one another, no matter how [8] busy the hand that wears them—all this and beauty too. Yes, beautiful, blue-

Plaintiff's Exhibit M3—(Continued)
(Deposition of Phil Kleiger.)

white diamonds, set in hand made, tempered mountings of white or natural gold or platinum."

Mr. Hursh: I will introduce that radio script as Exhibit 1, and if it is satisfactory, I will mark the script, Mr. Naylor.

Mr. Naylor: Yes.

Q. Turning to the next script, dated August 18, 1947, do you have a mention in this script of the rings Wed-Lok? A. Yes, sir.

Q. Will you read that one sentence that I indicate?

A. "Especially eye-appealing is their new 'Wed-Lok' creation—two separate rings that lock together."

Mr. Hursh: I introduce this script as Exhibit 2.

Q. The next script is the script of August 13, 1947. Do you mention in that script the ring creation under the trade-mark "Wed-Lok"?

A. Do you want me to read this?

Q. Yes.

A. "Equally popular is the new 'Wedlock' creation by Granat—two separate rings that 'click' together, keeping them correctly aligned to one another."

Mr. Hursh: I want to introduce this script as Exhibit 3.

Mr. Naylor: For further identification, are all of [9] these scripts material which was broadcast over KOA?

Plaintiff's Exhibit M3—(Continued)

(Deposition of Phil Kleiger.)

The Witness: Yes, sir.

Q. I show you script of August 4, 1947, for Radio Station KOA. Will you state whether or not that mentions the trade-mark "Wed-Lok"?

A. Yes, sir.

Q. Will you read the part I indicate?

A. "It's exciting—it's revolutionary—it's a miracle. Of course I mean the new Wed-Lok ensemble by Granat. No need to twist and turn these rings to keep them in position—no matter how active your hands may be. Solitaire and wedding band are completely separate, but a tiny gesture and 'click' —their loveliness is locked together, keeping them always correctly aligned to one another."

Mr. Hursh: I will introduce that as Exhibit 4.

Q. I show you script dated December 3, 1947, for Radio Station KOA, and ask you if you in that script mention Wed-Lok ring ensemble?

A. Yes, sir.

Q. Will you read the portion relating to the Wed-Lok ensemble?

A. "As radiantly lovely as the bride herself are the Wed-Lok wedding and engagement ring combinations on display at this store. Wed-Lok rings can't slip out of position, they can't rub or wear against one another—for a tiny [10] gesture locks them together (although you may wear them separately whenever you choose)."

Mr. Hursh: I will mark that and introduce it in evidence as Exhibit 5.

Plaintiff's Exhibit M3—(Continued)

(Deposition of Phil Kleiger.)

Q. I show you radio script for December 1, 1947, over Station KOA. In this script do you mention Wed-Lok rings? A. Yes, sir.

Q. Will you read the part indicated?

A. "Folks, let the Kortz Jewelry Company reveal to you the secret of Wed-Lok rings. They are new—they are different. With Wed-Lok rings, a modern miracle has been accomplished in ring-making. The engagement and wedding band may be worn individually—yet with a quick 'click' they join together and become as one. Thus keeping them in correct position at all times—no matter how active your hands may be. Be sure to see the beautiful Wed-Lok 'duo'—now featured for just $165."

Mr. Hursh: I will introduce that script in evidence as Exhibit 6.

Q. I show you radio script for November 28, 1947, for Radio Station KOA, and ask you if you mention Wed-Lok rings in that script?

A. Yes, sir, I do.

Q. Will you read the part indicated by me in that script?

A. "At the Kortz Jewelry Company, the store which has [11] been in business 54 years, you'll find gorgeous blue-white solitaires and matching wedding bands—in hand-made mountings fashioned of Granat tempered gold. Be sure to see the new Wed-Lok combination with a perfect blue-white dia-

Plaintiff's Exhibit M3—(Continued)
(Deposition of Phil Kleiger.)

mond solitaire surrounded by two side diamonds—and the perfectly matched wedding band of three diamonds—now priced at just $165."

Mr. Hursh: I will introduce that script as Exhibit 7.

Q. I show you radio script of November 24, 1947, for Station KOA, and ask you if the trade-mark "Wed-Lok" is mentioned in that script?

A. Yes, sir.

Q. Will you read the part pertaining to the Wed-Lok trade-mark?

A. "You'll be delighted to discover Wed-Lok bridal combinations. Like all Granat rings, Wed-Lok ensembles are set with fine quality diamonds. And you'll find many outstanding values if you select your rings now. See the new Wed-Lok combination with a perfect blue-white diamond solitaire surrounded by two side diamonds—and the perfectly matched wedding band of three diamonds—now priced at just $165."

Mr. Hursh: I will introduce that in evidence as Exhibit 8.

Q. Will you state whether or not the radio script of [12] November 17, 1947, for Station KOA mentions the Wed-Lok ring ensembles?

A. Yes, sir.

Q. Will you read the portion of that script pertaining to the Wed-Lok ensemble?

A. "Wed-Lok combinations including the engagement and wedding band are of finest quality

Plaintiff's Exhibit M3—(Continued)
(Deposition of Phil Kleiger.)

and matchless beauty. And you'll find beautiful combinations priced for any pocketbook. Be sure to see the lovely 6 diamond bridal pair—3 diamonds in the beautifully designed engagement ring—and 3 diamonds in the matching wedding band."

Mr. Hursh: I introduce that in evidence as Exhibit 9.

Q. Turning now to the radio script of October 22, 1947, for Station KOA, have you mentioned Wed-Lok rings in this script? A. Yes, sir.

Q. Will you read the portion pertaining to Wed-Lok rings?

A. "You'll be delighted when you discover Granat Wed-Lok rings at the Kortz Jewelry Company. Wed-Lok rings can't slip out of position on your finger and they can't rub against one another—for one tiny gesture locks them together—although you may wear them separately if you wish. Each Granat diamond solitaire is perfect blue-white quality and decorative diamonds are carefully selected for color and brilliance. And say, speaking of diamonds—here's an unusual value now [13] offered at the Kortz Jewelry Company. A six-diamond bridal pair combination."

Mr. Naylor: Is the price indicated there?

Mr. Hursh: Yes.

Q. Will you read the price, please?

A. $49.50.

Q. Would that be a Wed-Lok ring ensemble?

Plaintiff's Exhibit M3—(Continued)
(Deposition of Phil Kleiger.)

A. No. Well, that pertains, speaking of diamonds, there is an unusual diamond value over at Kortz'. These (indicating) are pertaining to the Wed-Lok rings, which is separate, at the start of the paragraph.

Q. Now, in the radio script of October 15, 1947, for Radio Station KOA, will you state whether or not Wed-Lok ring ensembles are mentioned?

A. Yes, sir.

Q. Will you read the portion pertaining to Wed-Lok ring ensembles?

A. "Folks, let the Kortz Jewelry Company reveal to you the secret of Wed-Lok rings by Granat. They are new—they are different. With Wed-Lok rings, Granat has accomplished a modern miracle in ring-making. The engagement and wedding band may be worn individually—yet with a quick 'click' they join together and become as one. Be sure to see the beautiful Wed-Lok 'duo'—now featured at the Kortz Jewelry Company for just $165." [14]

Q. I show you radio script for October 6, 1947, for Station KOA, and ask you if you mentioned Wed-Lok ring ensembles in that script?

A. Yes, sir.

Q. Will you read the portion pertaining to Wed-Lok ensembles?

A. "Have you seen the new Granat Wed-Lok rings at the Kortz Jewelry Company? If not, do so at the first opportunity. Wed-Lok ensembles

Plaintiff's Exhibit M3—(Continued)
(Deposition of Phil Kleiger.)

are an exclusive Granat patented feature—the engagement and wedding band may be worn individually—yet with a quick 'click' they join together and become as one. This means your rings are always correctly aligned to one another. Be sure to see the beautiful Wed-Lok 'duo'—now featured at the Kortz Jewelry Company—both rings for just $165."

Q. I show you script of September 29, 1947, for Radio Station KOA. In this script do you mention Wed-Lok rings? A. Yes.

Q. Will you read the portion pertaining to the Wed-Lok rings in this script?

A. "'About-to-be-engaged' couples will be delighted to discover Granat Wed-Lok rings—at the Kortz Jewelry Company. A tiny gesture locks the engagement and wedding rings together, keeping them always correctly aligned to one another. Fine quality diamonds, selected for uniformity, color and [15] brilliancy are set in the exclusive platinum and gold tempered mountings—wrought in matching designs to protect your diamonds. See the beautiful Wed-Lok 'duo'—now featured at the Kortz Jewelry Company for just $165. Wed-Lok rings are the modern miracles in ring-designing. See them soon at the Kortz Jewelry Company."

Mr. Hursh: I will introduce the script of October 22. 1947, as Exhibit 10. The radio script for October 15, 1947, as Exhibit 11. The script for Oc-

Plaintiff's Exhibit M3—(Continued)
(Deposition of Phil Kleiger.)

tober 6 as Exhibit 12. The script for September 29, 1947, will be introduced as Exhibit 13.

Q. Will you examine the script for September 1, 1947, for Station KOA and state whether or not you mention Wed-Lok rings by Granat?

A. Yes, sir.

Q. Will you read that portion of the script referring to Wed-Lok rings?

A. "On those occasions when you know you're looking your best, your Wed-Lok rings by Granat look their very best too. For no matter how active your hands may be, your rings are always correctly aligned to one another. You see, Wed-Lok rings can't slip out of position on your finger—they can't rub or wear against one another—a tiny gesture locks them together—although you may continue to wear them separately whenever you choose. Stop in today and see them on exclusive [16] display in Denver at the Kortz Jewelry Company. In white or natural gold you may have a perfect blue-white diamond solitaire with 2 side diamonds; and wedding ring with three diamonds—priced at only $200."

Mr. Hursh: I will introduce that script as Exhibit 14.

Q. I show you script for February 25, 1948, for Station KOA. Will you state whether or not Wed-Lok rings are mentioned in that script?

A. Yes, sir.

Plaintiff's Exhibit M3—(Continued)

(Deposition of Phil Kleiger.)

Q. Will you read the portion pertaining to Wed-Lok rings?

A. "Fellows—make that engagement ring a truly lovely one—it represents the dream of a lifetime to her. The Kortz Jewelry Company has a wonderful selection of lovely engagement and wedding bands, beautifully designed and featuring the finest quality blue-white gems. See the Wed-Lok bridal rings by Granat—the solitaire and wedding band are completely separate but a tiny gesture locks them together—keeping them always in correct position. Mounted in tempered gold settings —your diamonds have greater protection and greater beauty."

Mr. Hursh: I will introduce this script as Exhibit 15.

Q. Referring to the script for January 28, 1948, for Station KOA, will you state whether that refers to Wed-Lok rings by Granat?

A. Yes. "On those occasions when you know you're looking [17] your best, Wed-Lok rings by Granat look their very best too, for they are always aligned correctly to one another."

Q. That reads, "for they are always correctly aligned to one another."

A. "For they are always correctly aligned to one another. You see, Wed-Lok rings can't slip out of position on your finger—they can't rub or wear against one another—a tiny gesture locks them to-

Plaintiff's Exhibit M3—(Continued)
(Deposition of Phil Kleiger.)

gether (although you may continue to wear them separately whenever you choose). And all the fine Granat quality you've come to know and expect is present in Wed-Lok rings; each diamond solitaire is a perfect blue-white quality, and decorative diamonds are carefully selected for color and brilliance. Come in and see the beautiful Wed-Lok combination priced at just $165. Wed-Lok rings are guaranteed for a life-time."

Mr. Hursh: I introduce that script as Exhibit 16.

Q. I notice, Mr. Kleiger, that you have stated in many of your ads that the Wed-Lok ensemble sells for $165. Is that the cheapest price Wed-Lok ensemble that you have sold of the Wed-Lok type?

A. I believe that is, yes; that is the starting point;——

Q. To what price do they go?

A. ——I think there is one starts at $150, tax included.

Q. And how high do the prices go, that you handle?

A. There is an ensemble—well, I have them in platinum—I [18] couldn't say just exactly how much.

Q. But they do go above $165?

A. Oh, yes. I think there are rings for four hundred and more dollars, in platinum. I can't say the exact price.

Q. With reference to your newspaper advertise-

Plaintiff's Exhibit M3—(Continued)

(Deposition of Phil Kleiger.)

ments, have you attempted to locate your newspaper advertisements?

A. I have tried, on very short notice, but I wasn't successful in doing so, only obtaining a few of them that he had at the office; due to the change of advertising agency, it had a tendency to kind of disrupt it, so far as getting all the newspaper advertisements which we had.

Q. But you have produced six advertisements that you have run in the Denver papers, have you?

A. Yes. Well, those are the six that my previous advertising man has laid his hands on in a hurry, and he brought them in to me last night.

Q. One of these ads it is noted was run in The Denver Post on August 3, 1947, featuring Wed-Lok Handmade Ensembles. Another was run in The Denver Post on September 4, 1947. Another advertisement was run in The Denver Post on October 17, 1947. One in The Denver Post October 31, 1947. One in the Rocky Mountain News August 10, 1947. And the last was in the Rocky Mountain News in August, 1947, with the day not shown. Will you state whether or not all of those ads were run in the respective papers on the dates shown? [19]

A. Yes, sir.

Mr. Hursh: I will introduce these advertisements in evidence as Exhibit 17.

Q. These are the only ads that you have discovered at the present time?

Plaintiff's Exhibit M3—(Continued)
(Deposition of Phil Kleiger.)

A. Those are all they could get for me.

Q. I notice in your radio script that you mention the fact that the Wed-Lok rings are made by Granat. Is that usually your practice in the radio script, that you mention the manufacturers, Granat Brothers? A. Yes, sir.

Q. Have you ever come across a ring ensemble known as the Feature-Lok ensemble?

A. I came across it in advertising, yes.

Q. Was this Feature-Lok trade-mark applied to a wedding ring and engagement ring ensemble?

A. Yes.

Q. Are those identical with the products that you sell under the trade-name "Wed-Lok"?

A. Yes, sir.

Q. What was your first impression when you first saw the advertisement advertising the wedding and engagement ring ensemble under the trade-name "Feature-Lok"?

Mr. Naylor: That is objected to unless you explain what you mean by the word "impression." Impression as to [20] what?

Mr. Hursh: I am asking the witness what first came to his mind when he read the advertisement—what thought came to his mind with respect to the trade-mark "Feature-Lok."

Mr. Naylor: That is objected to as leading.

Q. Will you answer the question?

Plaintiff's Exhibit M3—(Continued)

(Deposition of Phil Kleiger.)

A. Yes. Well, the word "Lok" was just imbedded in the back of my mind whenever I saw it—that is, in connection with any rings—and naturally made me think of Granat, being that I have handled the Wed-Lok rings for a good many years, and when I first saw the advertising on this Feature-Lok ring—I believe it was in one of the trade journals—Feature rings—I was under the impression it was one of the other features of Granat. Of course, I have always associated the word "Lok" with the Granat rings.

Q. In your use of the trade-mark "Wed-Lok" and the sale of ring ensembles under the trade-mark "Wed-Lok," did you consider the word "Lok" to be a dominant part of the trade-mark?

Mr. Naylor: That is objected to as calling for the opinion and conclusion of this witness, usurping the power of the Judge to decide ultimately the issues of this case. A. Yes, sir.

Q. Have many customers entered your store and asked to [21] see Wed-Lok rings?

A. Yes, sir.

Q. How often has that occurred?

A. Quite often.

Mr. Hursh: That is all the direct examination.

Cross-Examination

By Mr. Naylor:

Q. The word "Feature" did not suggest any-

Plaintiff's Exhibit M3—(Continued)

(Deposition of Phil Kleiger.)

thing about "Granat" when you saw it in the advertisement, did it, Mr. Kleiger?

A. Not the word "Feature."

Q. It was solely the word "Lok"——

A. "Lok."

Q. ——that led you to believe that it had something to do with Granat?

A. That is right.

Q. Is Granat the only concern you know of which uses the word "Lok" as a part of the trade-name?

A. No. I know of a number of concerns at this particular time that use the word "Lok"; that is, through trade journals that I came across.

Q. Could you name a few of them?

A. Well, Miracle-Lok. I saw one, Cardinal-Lok. There is a Life-Lok.

Q. And you saw those in trade journals? [22]

A. Yes, sir.

Q. About when, sir? A. Pardon?

Q. About when did you see those?

A. Well, I glanced at the January—I am sure it was the January issue, or the February issue.

Mr. Hursh: That is, of this year?

The Witness: Yes.

Q. When did you first see the advertisement of Feature-Lok?

A. I can't say exactly. Approximately about a year ago.

Plaintiff's Exhibit M3—(Continued)

(Deposition of Phil Kleiger.)

Q. Now, when you saw "Miracle-Lok," did you think that was a Granat product?

A. No, I didn't think any of the rest of them were Granat, because they came out much later than Feature-Lok, which I believe was the first one that I came across, soon after Wed-Lok had been produced.

Q. Now, why was it, when you saw Miracle-Lok, that you wouldn't think of Granat Brothers as you had thought of Granat Brothers when you saw Feature-Lok?

A. For the simple reason that later on I found and came to the conclusion that Feature-Lok wasn't a Granat product, and naturally there were others that were coming out after that, which wouldn't exactly put it in my mind that it was a Granat product. [23]

Q. When did you make this finding that Feature-Lok was not a Granat product, as you say?

A. When did I make the finding?

Q. Yes.

A. I didn't make the finding until—some time after I saw the ad I was under that impression. Now, there is Kiger Brothers, at Kansas City, that I think at some time handled the Granat products—that is, they were jobbers and the Granat products went through them, and I was under the impression it was just another Granat product being

Plaintiff's Exhibit M3—(Continued)
(Deposition of Phil Kleiger.)

released through another channel when I saw the Feature-Lok advertised.

Q. In other words, you were under the impression that Granat Brothers were putting out Feature-Lok as a competitive ring to Wed-Lok?

A. To go through another channel, yes. At first I was under that impression.

Q. And when did you learn to the contrary?

A. I can't say as to when. There were salesmen coming through that came into the store and in our conversations I learned it.

Q. Now, when you saw Marvel-Lok, did you get the impression that that was a Granat product also?

A. I saw that yesterday for the first time, that I came across it—that is, in the February Journal; and I also saw Miracle-Lok for the first time in the February issue of the [24] Jewelers Circular.

Q. What impression did you get when you saw Miracle-Lok and Marvel-Lok?

A. That it was just a competitive item.

Q. Competitive of what?

A. With the Granat.

Q. The Granat Wed-Lok?

A. The Granat Wed-Lok, yes.

Q. And with Life-Lok did you get the same impression?

Plaintiff's Exhibit M3—(Continued)

(Deposition of Phil Kleiger.)

A. That it was another competitive item.

Q. In your radio advertising of Wed-Lok rings, as you read portions of the scripts, I got the impression that you repeatedly referred to the fact that the rings locked together. That is true, is it not? A. Yes, they locked together.

Q. And then the expression was, a tiny gesture locks or joins them together; is that right?

A. Yes, they click.

Q. What is the mechanical means that is employed to lock Wed-Lok rings together?

A. I don't quite understand the question.

Q. What kind of lock do they use?

A. Well, I believe in the Wed-Lok there is a little prong on the wedding ring that snaps into the engagement ring. [25]

Q. It is a male and female lock, is it?

A. Yes, a male and female lock.

Q. And they click together, as you say in your radio script? A. That is right.

Q. The word "lock," then, actually means what it says, that they lock together, doesn't it?

A. That is right.

Q. Wouldn't that be an apt description of it—two rings that lock together?

A. Regardless of as to how they are put together, they lock together, yes.

Q. That would be true, would it not, that they locked against relative movement?

Plaintiff's Exhibit M3—(Continued)
(Deposition of Phil Kleiger.)

A. If they snapped together, I would say they are locked.

Q. "Lock" would be a proper description of that, would it not? A. I think so.

Q. Have you in your store handled the Forstner line of products? A. Some, yes, sir.

Q. Do you handle their watch bands?

A. Yes.

Q. Their watch bracelets? A. Yes.

Q. Has it ever come to your attention that they use the [26] trade-mark "Kuik-Lok" on those chains?

A. I have never noticed that before, no.

Q. You never paid any attention to that?

A. No.

Q. Do you handle the Gemex line of products?

A. No, sir.

Q. Have those products ever come to your attention? A. No, sir.

Q. Have you ever heard of the Gem-Lok line of jewelry products? A. No, sir.

Q. You mentioned that business is done by you with Granat Brothers. Actually, it is done with Granat Manufacturers, isn't it?

A. Just what the connections are there I don't know. Frankly, I don't know whether it is Granat Manufacturers or Granat Brothers. We have done business with them under La Giacobbi. As to

Plaintiff's Exhibit M3—(Continued)

(Deposition of Phil Kleiger.)

whether it is Granat Brothers or Granat Manufacturers, I don't know. I know they changed their name since Mr. La Giacobbi has passed away; I am pretty sure.

Q. You have done business with Mr. Weinroth in that company, have you not? A. Yes, sir.

Q. In your advertising of Wed-Lok rings, do you get assistance from Granat? [27]

A. That is right, advertising materials.

Q. Do you get any allowances? A. No.

Q. Do you get any scripts? Do they supply you with radio scripts?

A. No. Our advertising people obtained the copy from Granat ads. Some was their original copy.

Q. For your newspaper advertising, they supply you with mats, don't they? A. Yes.

Q. That has always been true, has it not?

A. That is right.

Q. Are you the exclusive distributor for Wed-Loks in Denver? A. No, sir.

Q. Who else has them?

A. Well, I think Frumess has them.

Q. How do you spell that?

A. F-r-u-m-e-s-s.

Q. Is there anybody else?

A. Frumess is all I know of.

Q. Did you at one time have the exclusive distribution of Wed-Loks in Denver?

Plaintiff's Exhibit M3—(Continued)
(Deposition of Phil Kleiger.)

A. We never had the exclusive distribution of Granat [28] products. I thought I did at one time.

Q. Will you take a look at Plaintiff's Exhibit 14 on this deposition, the radio script of September 1, 1947?

A. It has the word "exclusive." I remember that. I thought I had it at that time, was the reason, but I found that Frumess got it at the same time. In September it is possible that I had the exclusive at that time, I don't know.

Q. The words in there are "On exclusive display," aren't they,—— A. That is right.

Q. ——in Plaintiff's Exhibit 14?

A. Yes, sir. At that time I thought that I did have it exclusive, and it might be that Frumess got it soon after that, although I was under the impression at that time that I did have the exclusive.

Q. In one of the scripts the expression was used, "Priced for any pocket book," and when you were asked by Mr. Hursh what the price range was I think you started off at $150, did you not?

A. Yes.

Q. Now, what is the practice in Denver with respect to mark-up, over and above wholesale cost?

A. There is no regular, standard setup with anybody as to the standard. Some were Keystone and some were 40 per cent over cost. There is no regular, set standard. If question is pertaining to

Plaintiff's Exhibit M3—(Continued)

(Deposition of Phil Kleiger.)

Wed-Lok the cost was Keystone. [29]

Q. Let us take a ring ensemble sold by you at a retail price of $150. What would you pay Granat Brothers for that ensemble at wholesale?

A. Well, in the lower-price merchandise I didn't handle Granat Brothers merchandise. It was the higher-price units that I always handled. Don't recollect above answer. Answer is $75.00.

Q. Well, you had one at $165, did you not?

A. Yes, tax included.

Q. And $15 of that was federal tax?

A. No, I don't think so. It might be on that particular item it was $150 set advertised at $165.00 tax included.

Q. Let's stick to the price at which you advertised some of these Wed-Loks. I think it was repeatedly remarked that the price was $165, was it not? A. $165.

Q. That was a Wed-Lok ring ensemble?

A. That was a Wed-Lok ring ensemble.

Q. What was the wholesale price that you paid Granat for that particular ensemble?

A. That I can't say. If that was a $150—I am pretty sure it was $75.

Q. $75?

A. That was the $150-ensemble, and it sold at $165, which [30] included the tax.

Q. Federal tax? A. Yes.

Plaintiff's Exhibit M3—(Continued)

(Deposition of Phil Kleiger.)

Q. Was that ensemble of Granat intended to sell or listed at retail for $200?

A. No. They had various prices. There were some $150, some at $200, some at $250, and on up.

Q. I don't think it has been mentioned here what your connection is with Kortz Jewelers.

A. My connection is partner, half owner of Kortz Jewelry Company.

Q. Kortz Jewelry Company?

A. Kortz Jewelry Company.

Q. Who is the other partner?

A. Harry Kortz.

Q. I think earlier in your testimony you mentioned that you had knowledge of Granat Brothers Wed-Lok line of goods for twelve or thirteen years; is that correct? A. That is right.

Q. How long have you personally handled Wed-Lok rings?

A. I would say around twenty years or better.

Q. Wed-Lok rings?

A. Wed-Lok rings, no. Granat rings.

Q. I am speaking of Wed-Lok.

A. My memory doesn't serve me so well to go back that [31] far, but I would say around about twelve years, or thereabouts, that we have had an ensemble that came through under the name of Wed-Lok.

Q. Did you handle that ring? A. Yes, sir.

Plaintiff's Exhibit M 3—(Continued)

(Deposition of Phil Kleiger.)

Q. Now, you mentioned that there were no purchases in the war time.

A. No, there were purchases in war time, but I don't remember of any Wed-Loks.

Q. I am speaking of Wed-Lok. A. No.

Q. What was the war time period during which you could not purchase the Wed-Lok rings?

A. I would say around 1941, and thereabouts.

Q. And that ran approximately to May, 1947, did it not?

A. Until the last Wed-Loks came through.

Q. To refresh your recollection on that, I note that your first advertisement of Wed-Lok rings after the war appears to have been Plaintiff's Exhibit 4, August 4, 1947. Would that be about the time? A. The first which?

Q. The first radio advertisement of Wed-Lok rings.

A. Well, I don't know as to the dates. I didn't follow that.

Q. Well, I take it that you were unable to find an earlier [32] radio script than August 4, 1947; is that correct?

A. That I don't know, because there were changes in advertising agencies before these people took over, and that I can't say.

Q. Your present agency is Neimann?

A. No, sir. Caron.

Q. And they are here in Denver?

Plaintiff's Exhibit M 3—(Continued)
(Deposition of Phil Kleiger.)

A. Yes, sir.

Q. Neimann was your first one?

A. No, Neimann was my second.

Q. Neimann preceded Caron, I should say.

A. No. Raymond Keane came in there first. Neimann took over that agency. And then after Neimann I had a party by the name of Brill Agency.

Q. They are also in Denver?

A. Yes, sir. And at present I have Caron. They are my present advertising people.

Q. For the purpose of giving your testimony here, did you check with Neimann and Brill in an effort to locate advertising material which they had placed for you pertaining to Wed-Lok?

A. That is right, yes.

Q. And they were not able to give you any help—— A. No, sir.

Q. ——other than what you produced? [33]

A. Neimann helped this morning, and Brill with the other. And my last one—I contacted them and they said all the copies of my advertising were turned over to me when used—that is Caron. He said he looked through them to see if he had any he hadn't turned over to me. And I didn't retain any copies after they were broadcast or run in the press.

Q. Who first approached you with reference to giving your deposition this morning?

Plaintiff's Exhibit M 3—(Continued)

(Deposition of Phil Kleiger.)

Q. Who first approached me?

Q. Yes. A. Well, a Granat salesman.

Q. What is his name? A. Pinkston.

Q. When did he contact you?

A. When he came back to Denver, I would say about two weeks ago. About that. I can't say the exact date. It is about three weeks ago, or two.

Q. Did you have one conversation with him, or more than one?

A. The extent of all of the conversation was as to whether I would have any objections to giving a deposition to the Granat counsel if he would come in, and I said no—that is, pertaining to this suit.

Q. What did he tell you he was looking for in the way of evidence?

A. He didn't tell me. We didn't discuss anything as to [34] what he was looking for or anything pertaining to the deposition. There was no discussion at all.

Q. Didn't he mention that he was looking for proof as to Wed-Lok? A. No, sir.

Q. Well, when did you first gain knowledge of the fact that you would be interrogated concerning Wed-Lok? A. At that time.

Q. Well, that is what I was getting at.

A. Yes, at that time he said they had a suit against Feature Lok and if I would have any objections to giving this deposition.

Q. Concerning Wed-Lok?

Plaintiff's Exhibit M 3—(Continued)
(Deposition of Phil Kleiger.)

A. Concerning this Wed-Lok, yes.

Q. Now, did Mr. Pinkston mention Feature Lok in that conversation? A. He did, yes.

Q. What did he say about it?

A. That was the extent of the conversation, this Wed-Lok against Feature-Lok, pertaining to the patents. That is as far as the conversation went.

Mr. Hursh: Was it patents or trade-marks, Mr. Kleiger?

The Witness: Well, it would be trade-marks.

Q. Did Mr. Pinkston identify Feature Ring Company as the manufacturer of Feature-Lok?

A. There was no discussion on that. [35]

Q. No discussion? A. No, sir.

Q. Did you advise Mr. Pinkston at that time that you knew about Feature-Lok?

A. No, sir.

Q. You had no conversation with him whatever about that? A. No conversation whatsoever.

Q. Who next from Granat contacted you concerning the giving of this deposition?

A. I received a wire from Mr. Hursh's office as to whether I would be available for the taking of the deposition this morning.

Q. This morning? A. Yes.

Q. When did you first see Mr. Hursh?

A. Last night.

Q. Last night? A. Yes.

Plaintiff's Exhibit M 3—(Continued)
(Deposition of Phil Kleiger.)

Q. Mr. Hursh acquainted you, of course, with what was at issue in this case, did he not?

A. Yes.

Q. He mentioned Feature-Lok and Wed-Lok?

A. Well, I don't recollect any discussion about Feature-Lok, no.

Q. Nothing was said about it? [36]

A. I don't remember any discussion about Feature-Lok.

Q. (By Mr. Hursh): Well, we reviewed the testimony you were going to give this morning, in that conversation we had last night?

A. Yes; that is, pertaining to Wed-Lok.

Q. Yes. Pertaining to the whole deposition you were going to give this morning. That was reviewed with you? A. That is right.

Q. (By Mr. Naylor): Did you receive any merchandise at all from Granat Brothers in the war time period, 1941 to 1947? A. Yes, sir.

Q. What did you receive?

A. I received wedding rings, mountings, diamond rings.

Q. You did not receive any Wed-Loks, though, did you? A. No, never did.

Q. Between 1941 and 1947?

A. As to when the Wed-Loks came in—that is, the new Wed-Loks—I don't know the exact date.

Q. I take it, from what you say, that you did not advertise Wed-Loks during the war?

Plaintiff's Exhibit M 3—(Continued)
(Deposition of Phil Kleiger.)

A. No, I did not, not until I got my shipment.

Q. Until you got the first shipment after the war? [37]

A. That is right; that is, when the new Wed-Loks were released.

Q. Did you ever hear of Strauss and Strauss, a jewelry concern in New Jersey? A. No, sir.

Q. Did it ever come to your attention that they were using the trade-mark "W-e-d-l-o-c-k?"

A. No, sir.

Q. Were you ever aware of the fact that in the year 1936 Granat Brothers discontinued the use of "Wed-Lok" on wedding rings? A. No, sir.

Q. Do you recall a communication or any communication from Granat Brothers advising you or your organization that the term "W-e-d-d-e-d" would be substituted for the term Wed-Lok?

A. No, sir.

Q. Do you have any personal knowledge as to when Granat Brothers first used the term Wed-Lok? A. No, sir.

Mr. Naylor: I think that is all. [38]

Redirect Examination

By Mr. Hursh:

Q. When you saw the word "Feature" used in connection with the word "Lok" to describe a ring ensemble, whose product did you think it was?

A. Granat Brothers.

Plaintiff's Exhibit M 3—(Continued)
(Deposition of Phil Kleiger.)

Q. You were confused the first time you saw the word "Feature-Lok" used in the ring ensembles?

A. Yes, sir.

Q. You stated that you first saw the use of the trade-marks "Life-Lok" and "Miracle-Lok" in the February issue of the jewelers trade journal?

A. Not Life-Lok. I had seen that the latter part of October, I think, or November, of 1948. It was Cardinal-Lock and Miracle-Lok that I had seen in the February Jewelers Circular.

Q. At that time you had established to your own satisfaction that Feature-Lok was not a Granat Brothers product, had you?

A. At which time?

Q. The time you saw these other trade-marks employing the word "Lok?"

A. That is right, yes.

Q. Now, would you say that to you "Lok" describes the rings of the Wed-Lok ensemble, or does it describe some [39] particular feature of those rings?

A. Yes, I would say it describes the feature of the rings.

Q. You still call the individual wedding ring a Wed-Lok ring, do you not? A. Yes, sir.

Q. And you call the engagement ring a Wed-Lok ring?

A. No, that is the engagement ring,—it is a part of the Wed-Lok combination.

Plaintiff's Exhibit M 3—(Continued)

(Deposition of Phil Kleiger.)

Q. So far as you are concerned, they are both Wed-Lok rings, are they not?

A. Both of them, yes,—both rings.

Q. During the war period did you have difficulty in obtaining other types of merchandise to sell in your store? A. I did, yes.

Q. Did you have difficulty in securing Hamilton watches? A. Yes.

Q. And Elgin watches? A. Yes, sir.

Q. And various types of silverware, such as Rogers? A. Yes, sir.

Mr. Hursh: That is all the redirect. [40]

Recross-Examination

By Mr. Naylor:

Q. It was solely the word "Lok" in "Feature-Lok" that induced this confusion, as you call it, as to common origin in Granat Brothers?

A. What do you mean, "confusion?" I don't quite understand.

Q. Well, I don't quite understand it either, but that is the question you were asked, and you answered Yes, you were confused when you saw Feature-Lok. What was the confusion?

A. Well, I didn't use "confusion." I was under the impression that it was another Granat product when I first saw Feature-Lok advertised in the trade journal.

Q. You were under the impression?

A. I was under the impression.

Plaintiff's Exhibit M 3—(Continued)
(Deposition of Phil Kleiger.)

Q. And the impression lasted how long, Mr. Kleiger?

A. That I can't say, how long. When the salesmen came through. I really didn't give it a thought, as far as that is concerned.

Q. You didn't make any inquiry, did you?

A. I didn't make any inquiries, only of the salesmen of other lines that came through.

Q. And so this impression lasted until you had occasion to ask somebody about it; is that correct?

A. That is right.

Q. But the word "Feature" in the expression "Feature-Lok" [41] had no significance to you at all, did it? A. No, sir.

Q. You display your merchandise at your store, do you? A. Yes, sir.

Q. I noticed when I was there this morning that you had a display of such products as Gruen watches, several of the well-known fountain pens, and quite an extensive display of rings. How do you display the rings that you sell at your store?

A. How do I display them?

Q. Yes, sir.

A. You mean in the show windows?

Q. Yes, sir.

A. Well, for some time I have been displaying—that is, for instance, with the Wed-Loks there have been trays come through with the Wed-Lok sign—

Plaintiff's Exhibit M 3—(Continued)

(Deposition of Phil Kleiger.)

I don't know the exact wording, whether it is "Wed-Lok by Granat" or "Threesome," but it is a little fixture that sets right in the window, and unfortunately the card we received became a little abused and shopworn, is the reason I haven't used it for a week or two—I don't know how long. But up until recently there was a background put out—illuminated background — mechanical background — that shows Granat Wed-Loks, which was defective. That was returned.

Q. At present there is no display of Wed-Lok in your [42] store, is there?

A. There is a display of Wed-Lok, yes. I have Wed-Loks in there, but not with that sign.

Q. With that mark applied?

A. ——with that little—it was a tray in a nice worded sign, but that isn't in there now, but I do have Wed-Loks in the window now. With my own printed signs.

Q. Is there anything in your window that tells the public, as the public would see the articles through the window glass, that they are Wed-Loks?

A. I think there are little signs there that state the Wed-Lok Threesome.

Q. Are you sure about that?

A. I am not sure, no. If there isn't, that is due to negligence on the part of my window man.

Q. Well, I made a rather careful examination when I was at your store this morning, and I was

Plaintiff's Exhibit M 3—(Continued)
(Deposition of Phil Kleiger.)

unable to find the word "Wed-Lok" in any of the windows fronting on Sixteenth Street, and if I am mistaken, I wish you would correct me on this record by full description of what there is.

Mr. Hursh: I made the same examination, Mr. Naylor, and I didn't find a Wed-Lok ring mentioned by the name Wed-Lok; although there were a number of ring ensembles in that window, I didn't find the trade-mark "Wed-Lok" applied to those rings, on my examination of the window this morning.

Mr. Naylor: So that an observer could read it as such; is that correct?

Mr. Hursh: That is true; on Sixteenth Street I didn't find identification of the trade-mark "Wed-Lok."

Q. (By Mr. Hursh): But many times you do have such identifications in your window, do you not, Mr. Kleiger?

A. Yes, at all times, as I say, up until recently, when this beautifully designed card, due to the use of it, as I say, became too shopworn to put into the window, that is with the ring display trays which we have received from Granat.

Q. Do you take the diamond rings out of your window every day, in the evening, at night?

A. I don't. My help does.

Q. That is what I mean.

A. I have a window man who has full charge of the windows, and in this particular instance I was

Plaintiff's Exhibit M 3—(Continued)
(Deposition of Phil Kleiger.)

unaware of the fact that there was no fine little card stating Wed-Lok Threesome.

Q. But he takes the diamond rings out of the window at night-time and places them in a safe place, and then replaces the rings in your window every day? A. He what?

Q. He replaces that material in your window every day; [44] in other words, the trays, every day?

A. No, but once a week he changes the window around.

Q. (By Mr. Naylor): Have you had any boxes for Threesomes come through with the word "Wed-Lok" on the box anywhere?

A. I have had boxes come through for Threesomes, but whether they had the word "Wed-Lok" on them I am not sure about that, although in my window I have had my man make up Wed-Lok Threesomes, in which there is a matching gent's wedding ring, which I put into the same box and had a sign made up, "Wed-Lok Threesome."

Q. Are you familiar with the little pink box that Granat puts out to display on its merchandise? A. No.

Q. Just to clear the record on one point, Mr. Kleiger, there were sixteen radio scripts offered here in which Wed-Loks were mentioned. That did not comprise all of your radio advertising, did it?—these selected scripts?

Plaintiff's Exhibit M 3—(Continued)
(Deposition of Phil Kleiger.)

A. Well, at that time I was on another station. I didn't see any of their script there.

Q. Maybe I didn't make myself clear. Take, for example, the sheets of script contained in Plaintiff's Exhibits 5, 6, 7, 8, 9, 10, 11, etc., there are other scripts in that folder than those which were tagged, are there not? [45]

A. Well, there is just what you have there. They weren't all tagged. That is the complete script of the show. Now, they are fifteen-minute shows, you see, and that is the complete script. You take any date there, all this went in on that date there; there is nothing removed from there.

Q. What I am getting at is this: not every script in this folder mentions Wed-Lok?

A. Oh, no, not every one.

Q. Not every radio program that you had in this period mentioned Wed-Lok?

A. No, not every one.

Mr. Naylor: That is all.

(Witness excused.)

/s/ PHIL KLEIGER.

Subscribed and sworn to before me this 15th day of February, 1949.

My commission expires April 7, 1949.

[Seal] /s/ HAROLD N. WOODMAN,
Notary Public.

State of Colorado,
City and County of Denver—ss.

I, Harold N. Woodman, a notary public within and for the City and County of Denver, State of Colorado, do hereby certify:

That prior to being examined the witness whose signature is affixed to the foregoing deposition was sworn by me to testify the truth, the whole truth, and nothing but the truth;

That said deposition was taken down by me in shorthand at the time and place therein stated and was thereafter reduced to typewriting under my direction;

That when reduced to typewriting it was read by the said witness, who was duly informed by me of the right to make such corrections as might be necessary to render the same true and correct, and the same was thereupon signed by the said witness in my presence.

I further certify that I am not counsel or attorney for either of the parties hereto or in any way interested in the event of this cause, and that I am not related to either of the parties thereto.

Witness my hand and seal this 15th day of Feb., 1949.

[Seal] /s/ HAROLD N. WOODMAN,
Notary Public.

[Endorsed]: Filed Mar. 16, 1949.

[Title of Court and Cause.]

PLAINTIFF'S EXHIBIT N-3

Deposition of Arthur A. Novarro

The deposition of Arthur A. Navarro, a witness on the part of the Plaintiff, pursuant to Notice of Taking Depositions hereto annexed, and pursuant to the Rules of Civil Procedure for District Courts of the United States, before Earl W. Radford, a Notary Public of the County of Du Page, State of Illinois, acting as a Notary Public within and for the County of Kane, State of Illinois, under and by virtue of the provisions of Chapter 99, Paragraph 10, Illinois Revised Statutes, 1945, commencing at the hour of 10:00 o'clock in the forenoon, on Friday, February 11, A.D. 1949, at 11 North Broadway, Aurora, Illinois.

Appearances:

MELLIN AND HANSCOM, By
JACK E. HURSH, Esq.,

For the Plaintiff in each of the above-entitled causes.

NAYLOR AND LASSAGNE,

JOHN VAUGHAN GRONER, Esq.,
WILLIAM J. O'HEARN, JR., Esq., By
WILLIAM J. O'HEARN, JR., Esq.,

For the Defendants and Intervening Defendant in each of the above-entitled causes. [2]

Plaintiff's Exhibit N-3—(Continued)

Oath of Shorthand Reporter

I do solemnly swear that I will well and truly, faithfully, accurately and impartially report in shorthand the proceedings had upon the taking of the deposition herein, pursuant to Notice of Taking Depositions hereto annexed, and pursuant to the Rules of Civil Procedure for District Courts of the United States, and prepare a full, true and correct transcript of my shorthand notes so made as aforesaid, so help me God.

/s/ EARL W. RADFORD.

Subscribed and sworn to before me, this 11th day of February, A.D. 1949.

[Seal] /s/ JOSEPH S. GUYETTE,
Notary Public, Cook County,
Illinois.

My Commission Expires May 31, 1951. [7]

PROCEEDINGS

Mr. Hursh: It is stipulated that we can attach a copy of the Notice with the transcript of the deposition.

Mr. O'Hearn: Yes.

Mr. Hursh: And it is stipulated that Mr. Radford, the Reporter and Notary Public, may take down the deposition in shorthand, and transcribe it into typewriting, the original of said transcript to be sent to the Clerk of the Court, with carbon copies for Counsel.

Plaintiff's Exhibit N-3—(Continued)

It is also stipulated that we reserve all objections to questions, except as to the form of the question.

Mr. O'Hearn: It is so stipulated. [8]

ARTHUR A. NAVARRO

of lawful age, having been by me, the said Earl W. Radford, as Notary Public as aforesaid, first duly cautioned and sworn to tell the truth, the whole truth and nothing but the truth, in the matter of controversy aforesaid, was examined and did thereupon depose, testify and say as follows, viz.:

Direct Examination

By Mr. Hursh:

Q. Will you state your name?

A. Arthur A. Navarro.

Q. And where do you reside?

A. 250 Sullivan Road, Aurora, Illinois.

Q. What is your occupation? A. Jeweler.

Q. How long have you been engaged in the jewelry business? A. About twenty-four years.

Q. Do you know of a firm of manufacturing jewelers by the name of Granat Bros.?

A. Yes, sir.

Q. Do you know where that firm is located?

A. In San Francisco. [9]

Q. How long have you known of Granat Bros.?

A. I have known of them for quite a while, but I have done business with them for about four or five years, I think.

Q. Could you tell us just how long you have

Plaintiff's Exhibit N-3—(Continued)
(Deposition of Arthur A. Navarro.)

known of them, when you heard of them first, approximately?

A. I heard of Granat Bros., I should say, maybe fifteen years ago.

Q. And do you handle Granat Bros. products?

A. Yes, I do.

Q. Do you know of a wedding ring ensemble that is sold under the trade-mark "Wed-Lok"?

A. Yes, I do.

Q. Who produces that wedding ring ensemble?

A. Granat Bros.

Q. How long have you known of the trade-mark "Wed-Lok", as applied to wedding ring and engagement ring ensembles?

A. I think about three and a half years, maybe.

Q. Do you know the products that Granat Bros. manufactures and sells?

A. Well, we handle their diamond goods, their Wed-Lok rings, we handle their mountings and wedding bands. [10]

Q. Could you state the quality of the product sold by Granat Bros.?

A. I would say it is the finest.

Q. Do you know what reputation Granat Bros. has in the Aurora area?

A. I would say they have a very fine reputation, for the merchandise that we sell.

Q. When you hear the word "Wed-Lok", spelled either "L-o-k" or "L-o-c-k", as applied to wedding

Plaintiff's Exhibit N-3—(Continued)

(Deposition of Arthur A. Navarro.)

ring or engagement ring ensembles, with whose products do you identify them?

A. Immediately I would think of Granat Bros.

Q. What would you say the quality of the Wed-Lok rings that you sell is? A. Top quality.

Q. How long have you sold these wedding rings under the trade-mark "Wed-Lok"?

A. I don't know exactly. Maybe three years, or so.

Q. Do you advertise your sale of Wed-Lok rings? A. Oh, yes.

Q. What media do you use to advertise Wed-Lok rings in this area?

A. Newspaper, direct mail, and on the radio.

Q. How often do you advertise in the newspapers [11] the Wed-Lok ring ensembles?

A. Well, I think about three or four times a month, about three or four or five times a month, I will say, total.

Q. Have you any examples of the ads that you place in the papers? A. Yes, I have.

Q. Will you produce them, please?

(Witness producing advertisements.)

Q. You have produced four advertisements.

A. Have I got to get them all? It will take a long time to check all this stuff up.

Mr. Hursh: We will not have time to secure them all, unless counsel will stipulate that the other

Plaintiff's Exhibit N-3—(Continued)
(Deposition of Arthur A. Navarro.)

advertisements may be added as exhibits to the deposition.

Mr. O'Hearn: Yes.

Mr. Hursh: Photostatic copies of those advertisements.

Mr. O'Hearn: All, from the very beginning? Couldn't we pick out a few that would be typical?

Mr. Hursh: He has a few here that are typical. Suppose we place these typical [12] ones in, and then he can testify as to the frequency of the placement of advertisements in the local newspapers?

Mr. O'Hearn: I am agreeable to that.

Q. (By Mr. Hursh): The first advertisement, in order of date, is one dated Wednesday, July 28th.

A. That is the Aurora Beacon News. There are a lot of them in different newspapers in small cities.

Q. What paper was this advertisement of Wednesday, July 28th, run in?

A. The Aurora Beacon News.

Q. What year was that? A. This is 1948.

Mr. Hursh: I will introduce this advertisement as Exhibit 1 to this deposition.

(The advertisement referred to, so offered in evidence, was marked Deposition Exhibit No. 1, and the same is attached to and made a part of this deposition.)

Q. (By Mr. Hursh): I show you another advertisement, showing the use of the trade-mark

Plaintiff's Exhibit N-3—(Continued)

(Deposition of Arthur A. Navarro.)

"Wed-Lok", and ask you if you [13] can identify that advertisement. (Handing advertisement to the witness.) A. Yes, I can identify it.

Q. What paper was that run in?

A. Aurora Beacon News.

Q. And what date was it placed in the paper?

A. May 14, 1948.

Mr. Hursh: I will introduce that in evidence as Exhibit 2.

(The advertisement referred to, so offered in evidence, was marked Deposition Exhibit No. 2, and the same is attached to and made a part of this deposition.)

Q. (By Mr. Hursh): I show you another advertisement, and ask you if you can identify that advertisement. (Handing advertisement to the witness.) A. I can.

Q. What date was that advertisement run?

A. January 11, 1948.

Q. In what paper?

A. The Aurora Beacon News.

Mr. Hursh: I will introduce that as [14] Exhibit No. 3.

(The advertisement referred to, so offered in evidence, was marked Deposition Exhibit No. 3, and the same is attached to and made a part of this deposition.)

Plaintiff's Exhibit N-3—(Continued)

(Deposition of Arthur A. Navarro.)

Q. (By Mr. Hursh): I show you another advertisement. Can you identify that advertisement? (Handing advertisement to the witness.)

A. Yes. Friday, January 2nd.

Q. I see that the date, 1947, is scratched out. Evidently they forgot to change the date. What date is that? A. 1948.

Q. You recollect that advertisement was placed in the paper in 1948? A. Yes, sir.

Mr. Hursh: I will introduce that as Exhibit No. 4.

(The advertisement referred to, so offered in evidence, was marked Deposition Exhibit No. 4, and the same is attached to and made a part of this deposition.) [15]

Q. (By Mr. Hursh): Are those all of the advertisements that you have been able to secure at the present moment?

A. Right at this moment, but we can get the others, if you have to have them.

Q. And you have advertised on an average of three or four times a month in the local papers?

A. I would say so. Ever since we have had it, we have been advertising.

Q. What papers, outside of the City of Aurora, do you advertise in?

A. We advertise in Naperville, Illinois, we advertise in Organized Farmer, the Aurora Economist, the Aurora Beacon News. The Organized Farmer

Plaintiff's Exhibit N-3—(Continued)
(Deposition of Arthur A. Navarro.)

is in Naperville. We advertise in the Kendall County Record, the DeKalb Sun, and the College Chronicle, that is Naperville.

Q. I would like to secure all of the advertisements, if I possibly could.

A. That is going to be a job.

Q. What I would like you to do, Mr. Navarro, is request the newspapers to take a photostat of your advertisements, showing the entire page that your advertisement appears on, so that we will have the [16] date, and the name of the paper.

A. Just give me a minute.

Q. We want either an original copy of the page, or a photostat, and, if you will, send them to Mr. Radford. A. All right. I will do that.

Q. You have produced a proof of an advertisement. Could you identify that proof?

A. Yes. That is yesterday's ad in the Aurora Beacon News. In fact, I think this is being run now, the same ad, three times a week, for the past four or five weeks.

Mr. Hursh: I will introduce that in evidence as Exhibit 5.

(The proof of the advertisement referred to, so offered in evidence, was marked Deposition Exhibit No. 5, and the same is attached to and made a part of this deposition.)

Q. (By Mr. Hursh): You have produced an-

Plaintiff's Exhibit N-3—(Continued)

(Deposition of Arthur A. Navarro.)

other advertisement of the Aurora Economist, dated February 3rd, showing an ad appearing on page 3. Will you identify that advertisement? [17]

A. Yes, sir.

Q. That is the advertisement of your store?

A. Yes, sir.

Mr. Hursh: I will introduce that in evidence as Exhibit 6.

(The advertisement referred to, so offered in evidence, was marked Deposition Exhibit No. 6, and the same is attached to and made a part of this deposition.)

Q. (By Mr. Hursh): You also advertise by direct mail? A. Yes, sir.

Q. You have produced two pamphlets. I will ask you to identify the pamphlet I hand you, and tell us when that was sent out, and under what circumstances.

A. This is a mailing piece. This was sent out in 1947.

Q. Does this particular pamphlet identify your store? A. Yes, sir.

Q. And does it also advertise your sale of Wed-Lok [18] rings?

A. Yes, sir. That is right on the back.

Mr. Hursh: I will introduce that in evidence as Exhibit 7.

Plaintiff's Exhibit N-3—(Continued)
(Deposition of Arthur A. Navarro.)

(The pamphlet referred to, so offered in evidence, was marked Deposition Exhibit No. 7, and the same is attached to and made a part of this deposition.)

Q. (By Mr. Hursh): With reference to Exhibit 7, how does this pamphlet come to you? How is it that you have the last page identifying your store and other products that you sell?

A. This is a New York outfit, an advertisement firm, and they make up a book, they come to a fellow like me, and a few more jewelers, and they suggest, and finally make up a book, and leave us the back page to have merchandise that is not in the book. In other words, I want a general line of goods shown, and they give us the back page. I am not sure whether it is extra cost.

Q. How many of these were sent out?

A. Five thousand, maybe 7500. [19]

Q. And they are sent out to various people in the Aurora area?

A. They are sent out to various people in the vicinity, the suburbs, Aurora and vicinity, but to Chicago suburbs we don't send them.

Q. You have also produced a second pamphlet. Can you identify this pamphlet for us?

A. Yes. This is the 1949 catalogue, or whatever you want to call it, December, 1949.

Q. You mean 1948? A. I mean 1948, yes.

Plaintiff's Exhibit N-3—(Continued)

(Deposition of Arthur A. Navarro.)

Q. I notice on the back page of that catalogue, it identifies your store, and also shows you sell Wed-Lok diamond rings, is that true?

A. That is right, sir.

Q. Was that pamphlet made up in the same manner as the pamphlet, Exhibit 7?

A. Yes, sir.

Mr. Hursh: I will introduce that as Exhibit 8.

(The pamphlet referred to, so offered in evidence, was marked Deposition Exhibit No. 8, and the same is attached to and made a part of this deposition.) [20]

Q. (By Mr. Hursh): Approximately how many of those pamphlets, such as the one identified as Exhibit 8, did you send out?

A. I think it was 5,000, or 7,500.

Q. You state that you advertise over the radio?

A. Yes, sir.

Q. How often does your program come on the air? A. Ten times a day.

Q. On this program, do you mention Wed-Lok ring ensembles? A. That is right, I do.

Q. Do you mention them every day?

A. Every day.

Q. Do you have a copy of the script which you employ in your air program?

A. I have. (Witness producing document.)

Q. You have produced a script of your radio program? A. That is right.

Plaintiff's Exhibit N-3—(Continued)

(Deposition of Arthur A. Navarro.)

Q. It is dated January 21, 1949? A. Yes.

Q. Is that the script that is sent over the air?

A. Yes, that is on now.

Q. How long is this particular script used on your [21] radio program?

A. Until I get out of the lazy mood, and write a new one. They go on for several months.

Q. I notice on the second page you have mentioned Wed-Lok diamond ring ensembles, and for the purpose of convenience, I will read the script into the record, and will you state whether or not it is a correct reading:

"The correct time is Now ..... Courtesy Navarro's The Diamond House. Navarro's are Aurora's exclusive distributor for Wed-Lok Diamond Ring ensembles. The rings that stay upright on your finger in platinum, white gold and yellow gold. Wed-Lok Diamond ensembles start from $175.00 for both rings. See these genuine Blue White diamonds today at Navarro's the Diamond House, Jewelers and Silversmiths at 11 North Broadway in down town Aurora. Your credit is good at Navarro's, pay as little as $1.25 weekly."

A. That is right.

Mr. Hursh: We will introduce that in evidence as Exhibit No. 9.

It is stipulated between counsel [22] that Exhibit No. 9 may be photostated, and the original copy of Exhibit 9 returned to Mr. Navarro, and a photostatic copy attached to the deposition.

Plaintiff's Exhibit N-3—(Continued)
(Deposition of Arthur A. Navarro.)

(The original of the document referred to was accordingly marked Deposition Exhibit No. 9, and, by stipulation, a photostatic copy thereof, likewise marked Deposition Exhibit No. 9, is attached to and made a part of this deposition.)

Q. (By Mr. Hursh): How long have you had your radio program? A. Five or six years.

Q. How long have you sold Wed-Lok rings in your store?

A. Three to three and a half years.

Q. When did you first mention the sale of Wed-Lok rings in your stores, on the radio?

A. From the time we first got them.

Q. So that your estimate would be, as I understand it, that for the past approximately three years you have mentioned Wed-Lok rings as being sold from your [23] store?

A. Exclusively from our store.

Q. When the word "lock" is used in conjunction with wedding ring and engagement ring ensembles, whose product do you identify?

Mr. O'Hearn: I would like to object to that question, on the ground that there is no claim here of infringement of a mark "lok" or "lock", disassociated from the word "Wed-Lok".

The Witness: Granat Bros.

Q. (By Mr. Hursh): When you first heard the

Plaintiff's Exhibit N-3—(Continued)

(Deposition of Arthur A. Navarro.)

trade-mark "Feature-Lock" used to identify wedding ring and engagement ring ensembles, with whose product do you identify it?

A. Granat Bros.

Q. In your sale of ring ensembles, under the term "Wed-Lok", would you state that the use of the word "Lok" in the trade-mark was a valuable part of the trade-mark?

A. Well, I would think, to me, the "Lok" is the whole thing, the diamonds, the platinum, the name, and everything, that is how I would associate "Lok".

Q. Do customers come into your store and ask for Wed-Lok ring ensembles by that name?

A. Oh, yes.

Q. How often does that occur?

A. It happens often. It doesn't happen every day, but it happens.

Mr. Hursh: That concludes the direct examination.

Cross-Examination

By Mr. O'Hearn:

Q. Mr. Navarro, how long have you used that radio script, Exhibit 9, in the form in which it exists there?

A. Since the date it is marked.

Q. And that date is January 21, 1949?

A. That is right.

Can I make something plain here? Anything we

Plaintiff's Exhibit N-3—(Continued)

(Deposition of Arthur A. Navarro.)

use on the radio, anything we use on an ad, for instance, if I use it today, the essence of the thing is used all the time. It may be in different form. [25]

Q. You mentioned several other outlying towns that you advertised in the papers. A. Yes.

Q. One, I think, was Naperville?

A. That is right.

Q. What would you say, roughly, was the population of Naperville?

A. About ten thousand.

Q. How about some of the other towns you mentioned, that you advertise in?

A. Ten or fifteen thousand. There are a lot of outlying little cities around.

Q. I understand you to say that you do not advertise in suburban Chicago? A. No.

Q. Are those papers in which you advertise in the small outlying towns weekly papers or monthly papers? A. Weeklies.

Q. How long did you say you have been acquainted with Granat Bros.?

A. I have known Granat Bros. for about fifteen years.

Q. Did you handle any of their goods prior to [26] the war? A. No.

Q. Are you personally acquainted with Mr. Lee Granat? A. No, sir.

Q. Or Joseph Granat? A. No, sir.

Q. You handle other goods manufactured by

Plaintiff's Exhibit N-3—(Continued)

(Deposition of Arthur A. Navarro.)

Plaintiff than the interlocking wedding and engagement ring? A. Yes, sir.

Q. Is the name "Wed-Lok" associated with any of the other Granat products, other than the interlocking rings?

A. No. We use the name "Granat," and we usually tell the people, "This makes the famous Wed-Lok set." We usually tell them that.

Q. The name "Wed-Lok," then, is used to distinguish the interlocking wedding and engagement rings from the other products of Granat Bros.?

A. I don't know exactly what you mean there.

Q. To you, does the name "Wed-Lok" mean the interlocking wedding and engagement rings manufactured by Granat Bros., rather than their entire line of products?

A. I would say that when we talk of Wed-Lok, we tell the customer that Granat Bros. are the finest makers of diamond rings. It takes the whole thing in, as far as I am concerned.

Q. They do not, and you do not advertise any of the other Granat products as Wed-Lok?

A. Granat Bros.

Q. But not Wed-Lok? A. No.

Q. You mentioned that you consider the word "Lok" important, as associated with this interlocking ring. Would you say that it was necessary as a part of the name when applied to a ring of this type in order to distinguish it from other types of rings?

Plaintiff's Exhibit N-3—(Continued)
(Deposition of Arthur A. Navarro.)

A. Well, I can only say the same thing, that "Wed-Lok" to me is Granat Bros. product, not only the name "Wed-Lok" but it is the quality of the merchandise, the mounting, the diamond, and so forth and so on, because in the first place, when we sell Wed-Lok, we immediately tell the customer who Granat Bros. are, the fine products they make, and that we actually feel honored by having the [28] line in the store, and I mean that sincerely.

Q. The word "Lok," in the trade-mark, associated with this type of ring, however, is necessary to distinguish it from other bridal sets. Is that why you state that you consider the word "Lok" important in the name?

A. I would say the whole thing is important, Granat Bros., and Wed-Lok.

Q. Do you know of any other interlocking bridal sets that are put out by other manufacturers under other names, including the word "lock"?

A. Yes, we have had several people in the store.

Q. Who were they, who did they represent?

A. I don't know exactly, but there have been several dealers in here.

Q. Could you mention some of the other names associated with interlocking rings which include the name "lock"?

A. There have been several of them. I don't remember exactly. If you mention some names that

Plaintiff's Exhibit N-3—(Continued)

(Deposition of Arthur A. Navarro.)

you fellows know, I may be able to tell you. We didn't pay any attention to it.

Q. Have you heard of Kin-lock?

A. Yes. [29]

Q. Who is that sold by? Sarkin?

A. I think so.

Q. Have you heard of Duolock?

A. I have.

Q. Have you heard of Gemlock? A. No.

Q. Have you heard of Life-Lok, manufactured by Manne & Son?

A. I think I have heard of that name.

Q. How long have you been familiar with these other names, including the word "lock" as applied to interlocking wedding rings?

A. Oh, the past year, I would say.

Q. You have been selling the Wed-Lok for three and a half years, approximately?

A. Well, I don't know exactly. I could check and look it up. About that time.

Q. Approximately since the end of the war?

A. I could give you the exact date, if you want it. I would have to check it up. I can't remember exactly.

Q. Could you find the date? A. July, '47.

Q. In July of 1947, had you heard of any other companies advertising interlocking wedding rings?

A. No, sir.

Q. You were, therefore, familiar with Granat's

Plaintiff's Exhibit N-3—(Continued)

(Deposition of Arthur A. Navarro.)

use of the word "Wed-Lok," as applied to interlocking wedding rings for approximately a year or more before you became acquainted with other trade-marks using the word "lock"?

A. I wasn't acquainted with it at all until he came into the store and sold it to me.

Mr. O'Hearn: I am afraid you didn't understand the question.

Will you read the question to him, please?

(Last question read by the Reporter.)

The Witness: Yes, sir.

Q. (By Mr. O'Hearn): Would you not say that the name "Wed-Lok," as applied to interlocking wedding and engagement rings, characterizes the function of the rings?

Mr. Hursh: I object to the question, unless the word "function" is defined.

Mr. O'Hearn: I would define the [31] word "function" as the manner in which the interlocking device causes the rings to cling together.

The Witness: I am going to say the same as I answered before, to me "Wed-Lok" is a Granat product, it is the whole business. I buy the ring because of the quality of it, and the make of it, and the high quality goods that it has. That is the actual truth and the fact about it.

Q. (By Mr. O'Hearn): But the name "Wed-Lok" does signify to you the interlocking wedding

Plaintiff's Exhibit N-3—(Continued)
(Deposition of Arthur A. Navarro.)

and engagement rings, as distinguished from Granat's other products?

A. I only identify it with Granat.

Q. Referring to Defendant's Exhibit 1, I read from that:

"Wed-Lok Rings. No need to twist and turn these rings to keep them in position, for wedding band and engagement ring lock together . . ."

Would you say that the name "Wed-Lok" there is used to describe the interlocking wedding ring which is stated in the advertisement to be a [32] wedding band and engagement ring which lock together?

A. I would describe it as a ring in whole, the company's wedding ring, the whole combination, everything combined, the ring, the set.

Q. Would you explain why it is that you say that you consider the word "Lok" to be an important part of the trade-mark "Wed-Lok"?

A. I will say the same thing. To me "Wed-Lok" and "Granat" is one thing, that is the product I am selling.

Q. Don't you think it is necessary, in introducing a product like this to the public, that is, an interlocking wedding and engagement ring, to name it in such a way that it would signify to the public how it is different from other types of wedding and engagement rings?

Plaintiff's Exhibit N-3—(Continued)

(Deposition of Arthur A. Navarro.)

A. We tell them it is a "Wed-Lok," it is a Granat Bros. product. That is what we tell them.

Q. Isn't it necessary to have, as part of the name, something which signifies to the public the distinction between this type of ring and another type of ring?

A. Is it important? That is what it says in the [33] paper. That is the only way we can describe it, as what I have been telling you.

Q. Who first approached you, Mr. Navarro, as to testifying here today?

A. You are both here.

Q. Prior to today.

A. I would say both of you at the same time.

Mr. Hursh: He means, who was the first one, when did you hear about this case, and the fact we wanted you to testify.

The Witness: Yesterday. Well, I got a letter, I think, before.

Q. (By Mr. O'Hearn): When did you get that letter, Mr. Navarro?

Mr. Hursh: Didn't the Granat salesman first contact you with respect to it?

The Witness: Yes. He came in and asked me if I would be willing to testify. Mr. Kamelack, I think it was, wasn't it?

Mr. Hursh: I don't know the name.

The Witness [34] (Continuing): He came in and asked me if I would be willing to testify to this business here, that's all.

Plaintiff's Exhibit N-3—(Continued)

(Deposition of Arthur A. Navarro.)

Q. (By Mr. O'Hearn): Did he explain what the suit was about?

A. I think he told me something about it. I don't remember exactly what he said. He said kind of an infringement or something, and would I be willing to testify.

Q. What was it he asked you if you would be willing to testify to?

A. He said I would hear from the firm, I think.

Q. He did not attempt to find out at that time what you would testify to?

A. No, he didn't. I think he said I would hear from the firm.

Q. Did you then hear from the firm?

A. I don't know whether we got a letter or not —not a letter. We got a wire. It wasn't from Granat, it was from the attorneys.

Q. When did you get that?

A. The wire was sent on January 31st.

(Witness producing telegram.)

Mr. O'Hearn: Could we have this marked?

(The telegram referred to was marked Defendants' Exhibit A, and the same is attached to and made a part of this deposition.)

Q. (By Mr. O'Hearn): Between the time you were approached by the salesman for Granat Bros., and the time you received this telegram, January 31, 1949, did you have any other communication from Granat Bros., or their attorneys?

Plaintiff's Exhibit N-3—(Continued)
(Deposition of Arthur A. Navarro.)

A. None whatsoever.

Q. Did you see anyone associated with Granat Bros., or their attorneys, between that time?

A. I think the salesman was here since that time, he was in the store for about five minutes, or ten minutes.

Q. Did you discuss with him at that time what you would testify to?

A. No, not a word. I didn't have much time that day, when I come to think of it, and there was nothing mentioned, nothing said, not a word. I think he came through with a line. [36]

Q. Did you go over with Mr. Hursh the testimony that you would give here today?

A. No, sir.

Q. No mention made at all of what you were going to talk about?

A. No, except waiting for you, he said you were supposed to be in on the 10:15 train, we were sitting, talking about other things.

Mr. Hursh: We did discuss this matter, though, yesterday, we went over your testimony.

The Witness: He asked me what happened today. Today, you said he was going to come here.

Q. (By Mr. O'Hearn): You did see Mr. Hursh yesterday? A. Yes, sir.

Q. Did you discuss yesterday with him what you would testify today?

Plaintiff's Exhibit N-3—(Continued)
(Deposition of Arthur A. Navarro.)

A. No. Yesterday he said you would be here tomorrow. I said I could see you both. He may have asked me to get some of this ready. Is that right?

Mr. Hursh: That is right. [37]

Q. (By Mr. O'Hearn): Was it because of the fact that Defendant's mark, "Feature-Lok," include the word "lock," that you associated it with Granat Bros.?

A. Well, the first time someone came in here, they told me they had something better than Granat, or something like that, I don't know how it was, immediately I thought that someone was trying to make the same thing as Granat. That is the impression I got.

Q. The first time you heard of this other interlocking ring sold under a name including the word "lock," the person who approached you said that he had something better than Granat Bros.?

A. That is what he said.

Q. Then you did not believe, when you first heard of this other mark, including the word "lock," that it was a product manufactured by Granat Bros.?

A. When he first came in, I thought maybe it was a secondary line, or something like that, but when he told me who he was, I didn't have a thing to do with it, because I didn't like the product, and I was satisfied with what I had. I thought maybe

Plaintiff's Exhibit N-3—(Continued)
(Deposition of Arthur A. Navarro.)

it was a cheaper line they were putting out, like [38] a lot of other diamond companies do.

Q. Did you think it likely that Granat Bros. would put out a secondary line, and then send out this salesman to sell you a better product than Wed-Lok?

A. I didn't think so, no, but for a minute I thought something like that.

Mr. O'Hearn: I think that is all.

Redirect Examination

By Mr. Hursh:

Q. What is the population of Aurora?

A. Fifty thousand.

Mr. Hursh: That is all.

Can we stipulate that the signature may be waived?

Mr. O'Hearn: That is agreeable to me.

Q. (By Mr. Hursh): Mr. Navarro, will you agree that it will be unnecessary for you to read and sign your deposition? A. Yes.

Mr. Hursh: It is stipulated that Mr. Navarro will endeavor to secure additional [39] advertisements that he has inserted in the newspapers in the Aurora area, and that these will be marked as Exhibits 10 and following, and that the Reporter may so mark them and attach them to the original of the deposition. In the event that Mr. Navarro does not secure these advertisements in time for the

Plaintiff's Exhibit N-3—(Continued)
(Deposition of Arthur A. Navarro.)

Reporter to attach them to the deposition, then they will be omitted therefrom.

Mr. O'Hearn: It is so stipulated.

(Signature waived.)

The reading of his foregoing fully transcribed deposition, and the signing thereof by the said witness, Arthur A. Navarro, were by stipulation by and between counsel for the parties, and by the witness, duly waived.

[Seal] /s/ EARL W. RADFORD,
Notary Public,
DuPage County, Illinois.

My Commission Expires September 8, 1949.

[Endorsed]: Filed Mar. 16, 1949.

PLAINTIFF'S EXHIBIT O-3

The deposition of Charles Van Sipma, a witness on the part of the Plaintiff, in each of the above-entitled causes, pursuant to Notice of Taking Depositions, a signed copy of which is attached to the deposition of Arthur A. Navarro, and pursuant to the Rules of Civil Procedure for District Courts of the United States, before Earl W. Radford, a Notary Public of the County of Du Page, State of Illinois, acting as a Notary Public within and

Plaintiff's Exhibit O-3—(Continued)

for the County of Cook, State of Illinois, under and by virtue of the provisions of Chapter 99, Paragraph 10, Illinois Revised Statutes, 1945, commencing at the hour of 2:00 o'clock in the afternoon, on Friday, February 11, A.D. 1949, at 11114 South Michigan, Chicago, Illinois.

Appearances:

MELLIN AND HANSCOM, By
JACK E. HURSH, ESQ.,
391 Sutter Street,
San Francisco 8, California,

For the Plaintiff in each of the above-entitled causes;

NAYLOR AND LASSAGNE,
Russ Building,
San Francisco, California, [2*]

JOHN VAUGHAN GRONER, ESQ., and

WILLIAM J. O'HEARN, JR., ESQ., By

WILLIAM J. O'HEARN, JR., ESQ.,
20 Exchange Place,
New York City, New York,

For the Defendants and Intervening Defendant in each of the above-entitled causes. [3]

*** Page numbering appearing at top of page of original Reporter's Transcript.**

Plaintiff's Exhibit O-3—(Continued)

Oath of Shorthand Reporter

I do solemnly swear that I will well and truly, faithfully, accurately and impartially report in shorthand the proceedings had upon the taking of the deposition herein, pursuant to Notice of Taking Depositions, and pursuant to the Rules of Civil Procedure for District Courts of the United States, and prepare a full, true and correct transcript of my shorthand notes so made as aforesaid, so help me God.

/s/ EARL W. RADFORD.

Subscribed and sworn to before me, this 11th day of February, A.D. 1949.

[Seal] /s/ JOSEPH S. GUYETTE,
Notary Public,
Cook County, Illinois.

My Commission expires May 31, 1951. [8]

By Mr. Hursh: The same stipulations that we entered into at the start of the Navarro deposition will be adhered to on this deposition.

Mr. O'Hearn: Yes.

CHARLES VAN SIPMA

of lawful age, having been by me, the said Earl W. Radford, as Notary Public as aforesaid, first duly cautioned and sworn to tell the truth, the whole truth and nothing but the truth, in the matter of

Plaintiff's Exhibit O-3—(Continued)
(Deposition of Charles Van Sipma.)

controversy aforesaid, was examined and did thereupon depose, testify and say as follows, viz.:

Direct Examination

By Mr. Hursh:

Q. State your name, please.

A. Charles Van Sipma.

Q. Where do you reside?

A. 11028 Parnell, Chicago.

Q. What is your occupation?

A. Jeweler and Optometrist. [9]

Q. How long have you been so engaged?

A. Since 1920.

Q. Do you know of a firm of manufacturing jewelers by the name of Granat Bros.?

A. I do.

Q. Do you know where the firm is located?

A. Yes.

Q. Where is it located?

A. San Francisco.

Q. How long have you known of this company?

A. I should say twenty years.

Q. Do you know the kind of merchandise they manufacture and sell? A. Yes.

Q. What type of merchandise is it?

A. The type we have been buying has been mountings and rings, wedding rings.

Q. Have you ever heard of the trade-mark "Wed-Lok" employed to identify a wedding ring

Plaintiff's Exhibit O-3—(Continued)
(Deposition of Charles Van Sipma.)

and engagement ring ensemble? A. I have.

Q. Whose product is identified by that trade-mark? A. Granat Bros. [10]

Q. How long have you known of the trade-mark "Wed-Lok," identifying ring ensembles?

A. As long as we have done business with them.

Q. Do you sell "Wed-Lok" rings in your store?

A. I do.

Q. How long have you sold "Wed-Lok" rings?

A. Since we have been doing business with them.

Q. Is that the "Wed-Lok" rings, or the Granat rings, now?

A. As soon as they came out with "Wed-Lok," we put those in. I don't know when that would have been. But the Granat ring, and then their matching wedding ring, when they came out with it, I think that is when we first did business with them.

Q. You could not fix that date by year, could you? A. No, I really couldn't.

Q. Do you know the quality of merchandise sold by Granat Bros.?

A. Yes. We have always found it very good quality.

Q. Could you tell the reputation that Granat Bros. has in this area for quality of merchandise they manufacture and sell?

A. I only know about what we sell of theirs, and that we always found good. [11]

Plaintiff's Exhibit O-3—(Continued)
(Deposition of Charles Van Sipma.)

Q. When you hear the word "lock," either spelled "L-o-k," or "L-o-c-k," employed to identify wedding ring and engagement ring ensembles, whose product do you identify it with?

Mr. O'Hearn: I object, as not coming within the terms of the complaint, since there is no claim made as to a trade-mark with the word "Lok," aside from its use in the word "Wed-Lok."

The Witness: I always identified it with the Granat rings.

Q. (By Mr. Hursh): Have you advertised the sale of Wed-Lok rings in your store?

A. Yes, we have.

Q. What type of advertising do you employ?

A. The mats furnished by them.

Q. How long have you advertised Wed-Lok rings?

A. Off and on. We used to insert one of theirs every once in a while with a certain type of ad we put in. I wouldn't know exactly how long, but the last several years.

Q. Do you have any such advertisements?

A. Just one that we had in yesterday. I do not [12] keep them.

Q. Can you produce that ad?

A. I can. (Witness producing advertisement.)

Q. You have produced an advertisement in the Calumet Index, dated Wednesday, February 9, 1949.

Plaintiff's Exhibit O-3—(Continued)

(Deposition of Charles Van Sipma.)

Is that your advertisement appearing on page 8 of this paper? A. That is right.

Q. And this advertisement refers to Wed-Lok rings sold by your store? A. That is right.

Q. Has it been your practice to put similar ads in the paper, identifying Wed-Lok rings by Granat?

A. That is right.

Q. For the past years? A. That is right.

Mr. Hursh: I will introduce this sheet as Exhibit 1, to this deposition.

(The advertisement referred to, so offered in evidence, was marked Deposition Exhibit No. 1, and the same is attached to and made a part of this deposition.) [13]

Q. (By Mr. Hursh): I notice on this advertisement that you mention Granat Bros. Is it your usual practice to identify the Wed-Lok rings as being manufactured by Granat Bros., in your ads?

A. That is right.

Q. Do you use any other medium of advertising?

A. Yes. We have had them in church papers, and church directories.

Q. Do you have any of those available?

A. No, I do not. I think that was several years ago that we had that.

Q. How often have you had your advertisements in church directories?

A. Probably only once, it is a yearly directory.

Q. What year was that? Do you know?

Plaintiff's Exhibit O-3—(Continued)
(Deposition of Charles Van Sipma.)

A. That I wouldn't know, but I know I have used those mats in their directory. I don't have any of those earlier copies.

Mr. Hursh: I believe that is all of the direct examination.

Cross-Examination

By Mr. O'Hearn:

Q. Is this area around in here called by any particular [14] name?

A. Well, yes, it is called Roseland. It is really Chicago, but the shopping area is Roseland.

Q. Approximately how far is it from the Downtown center of Chicago? A. Fifteen miles.

Q. Is this paper in which Exhibit 1 appeared published daily, or weekly?

A. Weekly—well, no. I would say semi-weekly. They have a Monday paper now, too.

Q. Do you know whether or not you handled Wed-Lok rings prior to the war?

A. Oh, yes, we did.

Q. Did you continue to sell them during the war, while the war was going on?

A. That is right, we did.

Q. In the same quantity that you sold them before the war, or since the war?

A. That would be rather hard to say. I don't know. Probably more. We have done more business during the war.

Q. Do you know of any other interlocking wed-

Plaintiff's Exhibit O-3—(Continued)

(Deposition of Charles Van Sipma.)

ding and engagement rings made by other manufacturers that are sold under trade-marks which include the [15] name "lock?"

A. I don't handle any, no.

Q. Do you know of any? A. Yes.

Q. Could you recall the names of any other interlocking ring sets that you know of?

A. Well, yes, the Feature-Lock. I have a few of those. Isn't that one made by Sless-Harwood?

Q. I think Feature-Lock is made by the Feature-Lock Co.

A. Then that is not it. But we have some from Sloss-Harwood that lock together. I don't know what they call it, however.

Q. Have you ever heard of Kin-Lock?

A. No.

Q. Or Duolock? A. No, I have not.

Q. Do you know that there is some other ring made that uses the word "lock" in its name?

A. Yes.

Q. How long have you been familiar with that?

A. Oh, just a short time, I would say.

Q. At the time that you first heard of Wed-Lok, however, you had not heard of any other [16] manufacturer that was selling a ring under any name with the word "lok" in it?

A. That is right.

Q. Would you say that that was the reason that you associate any name given to an interlocking ring

Plaintiff's Exhibit O-3—(Continued)
(Deposition of Charles Van Sipma.)

set which includes the word "lok" with the Granat company?

A. Well, they called theirs "Wed-Lok" before this, they made them conform, and called them Wed-Lok for that reason. They did not actually lock together, as they do now, but they had a conformity there, and that is where they got their name, I presume.

Q. Granat Bros. makes other types of rings, do they not, that do not interlock?

A. That is right.

Q. Do you sell some of those, too?

A. Yes, we do.

Q. The name Wed-Lok, however, is not associated with those rings, is it?

A. Well, when they are matched up, they are, yes.

Q. Whether or not they interlock?

A. That is right.

Q. Prior to the time that Wed-Lok was manufactured by Granat Bros., they sold other types of rings, [17] matching sets? A. That is right.

Q. Which did not interlock?

A. That is right.

Q. But they were not called Wed-Lok rings at that time?

A. When they matched they did, yes.

Q. I am going back before the period——

Plaintiff's Exhibit O-3—(Continued)
(Deposition of Charles Van Sipma.)

A. Of the clamping together, that is right, before that.

Q. (Continuing): ——before the period that Granat Bros. brought out an interlocking ring which they called Wed-Lok, they sold matching wedding and engagement rings, did they not?

A. That is right.

Q. Which did not interlock?

A. That is right.

Q. But they did not call those rings which did not interlock Wed-Lok? A. I think they did.

Mr. Hursh: I object to that quesiton, on the ground that I believe Mr. Van Sipma testified that those were rings where the mountings conformed in shape to one another, [18] and that Granat Bros., when they sold that type of ring, applied the trademark "Wed-Lok" to it.

I do not think the question is intelligible to Mr. Van Sipma, and I believe it should be cleared up, so that he knows just exactly which rings you are referring to.

Q. (By Mr. O'Hearn): Was there a period during which Granat Bros. made and sold wedding and engagement rings, in which they were sold not under the name Wed-Lok?

A. Well, not that I know of. I mean, if you would buy just one ring, for instance, without a matching wedding ring, it would not be called that,

Plaintiff's Exhibit O-3—(Continued)
(Deposition of Charles Van Sipma.)

but if you would buy a so-called matched set, it would be called a Wed-Lok.

Q. I believe you testified that you had known about Granat Bros. for approximately twenty years? A. I believe that is correct, yes.

Q. And that you have sold Wed-Lok rings since Granat Bros. brought out the Wed-Lok ring?

A. That is right, that is, unless they had it prior to that. But I mean, when we first did business [19] with them, that is what we bought. I am quite sure that would be twenty years ago.

Q. Were you selling rings called Wed-Lok rings twenty years ago?

A. If they had them at that time, yes.

Mr. Hursh: It is stipulated between Counsel that so far as this record is concerned, Granat Bros., some time in 1934, adopted and used the trade-mark "Wed-Lok" as identfiying products of their manufacture.

Q. (By Mr. O'Hearn): Do you know whether or not you did business with Granat Bros. prior to 1934? A. Yes, we did.

Q. Then you must have sold rings of Granat Bros. which were not known by the name "Wed-Lok"?

A. Yes, I would say that. Before they came out with them, it would have to be that, wouldn't it?

Plaintiff's Exhibit O-3—(Continued)
(Deposition of Charles Van Sipma.)

Q. Would you not say that the name Wed-Lok was adopted by Granat Bros. in the sale of their interlocking rings in order to distinguish these rings from their non-interlocking rings which they had previously sold? [20]

A. No, I would not, because we had sold them before, but they probably added this feature later. I don't know when that was—perhaps a couple of years ago, when they locked together, but they did sell them as Wed-Lok, before they did snap together.

Q. But those were the rings which did conform in their shape, so that they did cling together, whether or not they had an actual interlock device or not, is that not true? A. Yes.

Q. So that Granat Bros. adopted the mark "Wed-Lok" to distinguish any type of wedding and engagement ring which clung together, or locked?

A. And I believe when they matched together, too.

Q. When you speak of a matched set, you do not necessarily mean a set that clings together on the finger, and is thereby not able to turn around on the finger?

A. Well, I don't know whether that was applied to those rings or not, but I know they always had the Wed-Lok name to them. Whether it applied to those that were not conforming, or just matched, I wouldn't really know.

Plaintiff's Exhibit O-3—(Continued)
(Deposition of Charles Van Sipma.)

Q. Does the word "lock," when used in a trademark [21] or a trade name, signify anything to you as to the type of ring that is sold under that mark?

A. It would more or less now, since it has been adopted, that they snap together, yes.

Q. Would you say that the word "Wed-Lok," or the name "Wed-Lok," is used to characterize the function of the rings themselves, meaning the interlocking feature?

A. It would now at the present day, I think, yes.

Q. Do you not believe that in introducing an interlocking type of ring, as distinguished from a non-interlocking type of ring, it is necessary to include in the name of the ring either the word "lock" or something signifying locking together, in order to distinguish that type of ring from the non-interlocking type?

Mr. Hursh: I object to that question, on the ground it is really conjecture.

The Witness: I don't know much about what people would call anything. One might call it one thing, and another another, but what anyone would call it, I would not be prepared to answer. [22]

Q. (By Mr. O'Hearn): Is there any way of finding out from your records, Mr. Van Sipma, the quantities of Wed-Lok rings that you sold during the war period?

A. Well, I would have to find out. Our invoices

Plaintiff's Exhibit O-3—(Continued)

(Deposition of Charles Van Sipma.)

would show. It might be quite a job, being back three or four years.

Mr. Hursh: It is stipulated that Mr. Van Sipma will endeavor to check through his invoices and determine whether he purchased Wed-Lok rings during the war period, say, from 1941 to 1946. 1941-'47, we want any invoices showing Wed-Lok rings.

The Witness: That were marked Wed-Lok rings?

Mr. Hursh: Yes.

If he happens to know from other data on the invoice, anything that to his knowledge was a Wed-Lok ring, and so called by Granat Bros.

The Witness: But not the snap rings, you mean?

Mr. Hursh: I think they would have to be the conformed mounting rings. I will write him a letter to that effect. [23]

Mr. O'Hearn: I think that is all.

Redirect Examination

By Mr. Hursh:

Q. In your advertising, do you usually mention the fact that the Wed-Lok rings are manufactured by Granat Bros.?

A. Yes, I presume. I don't look too closely at them. I use the mats they furnish, and put it in as it is. Is it called that in there?

(Exhibit 1 was handed to the witness.)

Plaintiff's Exhibit O-3—(Continued)
(Deposition of Charles Van Sipma.)

The Witness (Continuing): Yes.

Q. (By Mr. Hursh): On these early rings that you purchased from Granat Bros., and sold under the trade-mark Wed-Lok, will you state whether they were the type of ring that had the conformed mounting, so that the mounting of the wedding ring fitted into and interlocked with the shape of the engagement ring, or not? A. That is right.

Q. And you sold those rings, of that character, under the trade-mark "Wed-Lok," to your customers? A. Yes, sir. [24]

Q. Do you have any customers come into your store and ask for ring ensembles under the trade-mark "Wed-Lok," solely mentioning Wed-Lok rings? A. We have, yes.

Q. Will you state whether or not, in applying the word "Lok" to a ring ensemble, that had interlocking means, you were describing the entire ring ensemble, or merely that the word "Lok" was suggestive of one characteristic for such an ensemble?

A. Well, if they asked for Wed-Lok, we would say it was the conforming ring, but today, I mean since Wed-Lok has come out with a locking device, I presume we would apply it, and show them the two rings that snap together.

Q. Would you say that the word "Lok" was merely suggestive of that characteristic of the snapping together of the two rings?

A. I think their own advertising would suggest

Plaintiff's Exhibit O-3—(Continued)

(Deposition of Charles Van Sipma.)

that, now, but I mean prior to that, we did. Since they brought out the lock, we call it that, because there are no other ones today, I mean, even manufacturing them, I don't believe. [25]

Recross-Examination

By Mr. O'Hearn:

Q. This is an advertisement that is made up from mats supplied by Granat Bros.?

A. That is right.

Q. This is the advertisement marked Deposition Exhibit 1:

"Wed-Lok Diamond Rings by Granat Locked together when worn together, these rings are always properly aligned, yet they unlock instantly at any time!"

Would you say that what I have just read from that advertisement is descriptive of the type of ring that is sold under the name "Wed-Lok"?

A. Yes, as it is written there, I would, yes.

Q. Would you say that the word "Wed-Lok" is itself descriptive of the ring that is sold under that name?

A. You mean that would describe the locking of it? No, sir, I don't think it would, unless you read further in there, probably. "Wed-Lok," as a heading there, wouldn't necessarily mean that they snapped together. [26]

Q. If you ran across any ring set sold now under any name including the word "lock," would

Plaintiff's Exhibit O-3—(Continued)
(Deposition of Charles Van Sipma.)

you not expect that it was an interlocking type of ring?

A. If it locked together, yes, I would, definitely.

Q. No. I mean, running across the name, including the word "lock," without knowing yourself whether the ring was an interlocking ring, would you not expect that the name was used with a ring set that did interlock?

A. No, I wouldn't say so, not the way they used it before. It would be a matching ring.

Q. I think all the time we may be misunderstanding each other. When I talk about an interlocking ring, I mean either a ring that snaps together, or a ring that is made so that the mounting of the wedding ring conforms to the mounting of the engagement ring, so that the two do interlock in a sense, and therefore do not slip on the finger.

If a ring were sold under any name which included the word "lock," would you not believe and expect that it was an interlocking type of ring, meaning either a snap interlock, or an interlock caused by the conformation? [27]

A. I would think so, yes.

Mr. O'Hearn: That is all.

Redirect Examination

By Mr. Hursh:

Q. Do you sell the Wed-Lok threesome in your store?

A. Occasionally, yes.

Plaintiff's Exhibit O-3—(Continued)

(Deposition of Charles Van Sipma.)

Q. In the Wed-Lok threesome, you have a gentleman's wedding ring, do you not? A. Yes.

Q. What do you call that wedding ring when sold in the Wed-Lok threesome? Is that a Wed-Lok ring, or not?

A. A Wed-Lok matching ring, yes.

Q. Will you state whether or not the men's matching wedding ring in a Wed-Lok threesome has interlocking means of any character?

A. No, only that it would match the set, but not a locking, it couldn't very well have.

Mr. Hursh: That is all.

It is stipulated by and between counsel that Mr. Van Sipma need not read or sign the deposition.

Mr. O'Hearn: It is so agreed. [28]

Q. (By Mr. Hursh): And, Mr. Van Sipma, do you agree it is not necessary for you to read and sign the deposition? A. Yes.

(Signature waived.)

The reading of his foregoing fully transcribed deposition, and the signing thereof by the said witness, Charles Van Sipma, were by stipulation by and between counsel for the parties, and by the witness, duly waived.

[Seal] /s/ EARL W. RADFORD,
Notary Public,
DuPage County, Illinois.

My Commission expires September 8, 1949.

Plaintiff's Exhibit O-3—(Continued)

(Deposition of Charles Van Sipma.)

State of Illinois,

County of Cook—ss.

Certificate of Notary Public and

Shorthand Reporter

I, Earl W. Radford, a Notary Public in and for the County of Du Page and State of Illinois, acting as a Notary Public within and for the County of Cook, and State of Illinois, under and by virtue of the provisions of Chapter 99, Paragraph 10, Illinois Revised Statutes, 1945, do hereby certify that the witness Charles Van Sipma, was by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in two certain causes now pending and undetermined in the District Court of the United States for the Northern District of California, Southern Division, to wit: Granat Bros., a corporation, Plaintiff, vs. Samuel H. Friend, S. Herbert Friend and Leonard V. Block, copartners doing business under the firm name and style of S. H. Friend, Defendants, and Feature Ring Co., Inc., [31] Intervening Defendant, Civil Action No. 28219-H; and Granat Bros., a corporation, Plaintiff, vs. Herbert Brown, an individual, Defendant, and Feature Ring Co., Inc., Intervening Defendant, Civil Action No. 28220-H.

That the said deposition of the said Charles Van Sipma was taken before me, beginning at the hour of 2:00 o'clock p.m., on Friday, the 11th day of

Plaintiff's Exhibit O-3—(Continued)

(Deposition of Charles Van Sipma.)

February, A.D. 1949, and concluded at the hour of 4:04 o'clock p.m. of the same day, at 11114 South Michigan, Chicago, Illinois, as hereinbefore more specifically set forth in the transcript of said deposition;

That the testimony contained in said deposition then and there given by said witness was taken down by me in shorthand, in the presence of said witness, and thereafter by me and under my direct personal supervision transcribed into typewriting.

I further certify that I am a Shorthand Reporter of more than twenty-five years' active experience immediately last past; and I further certify that the foregoing transcript of said deposition is a full, true and correct transcript of my said shorthand notes so made as aforesaid, [32] and is a full, true and correct report of the whole of the testimony so given by said witness as aforesaid, together with such other matters and things as Counsel for the parties present at the taking of said deposition desired to have appear of record.

I do further certify that said deposition was taken, beginning at the time and at the place mentioned and described in the caption and Notice of Taking Depositions, hereinbefore set forth, and as set forth in the foregoing transcript of said deposition, and that the taking of said deposition was completed, as aforesaid, on the 11th day of February, A.D. 1949.

Plaintiff's Exhibit O-3—(Continued)
(Deposition of Charles Van Sipma.)

I do further certify that by stipulation by and between Counsel for the parties, and by agreement of the Witness, the reading and signing of the said deposition by the said Witness were duly waived.

I further certify that during the taking of said deposition a certain document was produced and testified of, to, and concerning by the said Witness, which document was marked Deposition Exhibit No. 1, and the same is attached to and made a part of this deposition.

I do further certify that the Plaintiff [33] in each of said causes was represented at the taking of said deposition by Messrs. Mellin and Hanscom, (391 Sutter Street, San Francisco 8, California), by Jack E. Hursh, Esq., and that the Defendants and the Intervening Defendant were represented by Messrs. Naylor and Lassagne, (Russ Building, San Francisco, California), and John Vaughan Groner, Esq., and William J. O'Hearn, Jr., Esq., (20 Exchange Place, New York City, New York), by William J. O'Hearn, Jr., Esq.

I do further certify that I am not of counsel for, nor attorney or solicitor for any or either of the parties to said causes, nor am I related to any or either of the said parties, nor am I interested in any manner in the said causes or in the outcome.

Plaintiff's Exhibit O-3—(Continued)
(Deposition of Charles Van Sipma.)

I do further certify that it being impracticable for me to deliver the deposition aforesaid with my own hands to the Clerk of said Court, that after binding, taping, ensealing and certifying to the same as aforesaid, as more fully hereinbefore appears, I have sealed up the said deposition, and herewith direct and transmit the same by due course of the United States Mail, Registered, Postage fully prepaid, to the Court [34] in which said causes are pending, and that said deposition has been retained in my possession since the taking of said deposition, and until said deposition was sealed up and transmitted to the Clerk of said Court by registered United States Mail, as aforesaid.

In Witness Whereof, I have hereunto set my hand and notarial seal at Chicago, Cook County, Illinois, in said Northern District of Illinois, Eastern Division, at Chicago, certifying and returning said deposition to the above-entitled Court this 23rd day of February, A.D. 1949.

[Seal] /s/ EARL W. RADFORD,
Notary Public,
Du Page County, Illinois.

My commission expires September 8, 1949.

[Endorsed]: Filed Mar. 16, 1949.

Plaintiff's Exhibit O-3—(Continued)
(Deposition of Charles Van Sipma.)
DuPage County,
State of Illinois—ss.

I, Clarence V. Wagemann, Clerk of the County Court in and for said County, the same being a Court of Record, do hereby certify that Earl W. Radford whose signature appears to the foregoing proof of acknowledgment, was at the date of taking said proof a Notary Public in said County, as evidenced by his commission of record, in my office. That his commission bears date 8th day of September, A.D. 1945, and will expire on the 8th day of September, 1949. And I further certify that I am well acquainted with his handwriting and know that the signature purporting to be his, is genuine and that said acknowledgment is taken in accordance with the laws of Illinois, and that said Earl W. Radford as said Notary Public, was on the said date duly authorized to take acknowledgments throughout the State of Illinois in accordance with the provisions of Section 10, title "Notaries Public," of the Revised Statutes of Illinois.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Court at Wheaton, in said County, this 23rd day of September, A.D. 1949.

[Seal] /s/ CLARENCE V. WAGEMANN,
Clerk.

[Title of District Court and Cause]

PLAINTIFF'S EXHIBIT P3

The deposition of Norman Kernis, a witness on the part of the Plaintiff, in each of the above-entitled causes, pursuant to Notice of Taking Depositions, a signed copy of which is attached to the deposition of Arthur A. Navarro, and pursuant to the Rules of Civil Procedure for District Courts of the United States, before Earl W. Radford, a Notary Public of the County of Du Page, State of Illinois, acting as a Notary Public within and for the County of Cook, State of Illinois, under and by virtue of the provisions of Chapter 99, Paragraph 10, Illinois Revised Statutes, 1945, commencing at the hour of 4:35 o'clock in the afternoon, on Friday, February 11, A.D. 1949, at 6335 South Halsted Street, Chicago, Illinois.

Appearances:

MELLIN AND HANSCOM, By

JACK E. HURSH, ESQ.,
391 Sutter Street,
San Francisco, 8, California,

For the Plaintiff in each of the above-entitled causes;

NAYLOR AND LASSAGNE,
Russ Building,
San Francisco, California, [2*]

* Page numbering appearing at top of page of original Reporter's Transcript.

Plaintiff's Exhibit P3—(Continued)

JOHN VAUGHAN GRONER, ESQ., and

WILLIAM J. O'HEARN, JR., ESQ., By

WILLIAM J. O'HEARN, JR., ESQ.,
20 Exchange Place,
New York City, New York,
For the Defendants and Intervening Defendant in each of the above-entitled causes. [3]

Oath of Shorthand Reporter

I do solemnly swear that I will well and truly, faithfully, accurately and impartially report in shorthand the proceedings had upon the taking of the deposition herein, pursuant to Notice of Taking Depositions, and pursuant to the Rules of Civil Procedure for District Courts of the United States, and prepare a full, true and correct transcript of my shorthand notes so made as aforesaid, so help me God.

/s/ EARL W. RADFORD.

Subscribed and sworn to before me, this 11th day of February, A.D. 1949.

[Seal] /s/ JOSEPH S. GUYETTE,
Notary Public, Cook County, Illinois.

My Commission expires May 31, 1951. [8]

Plaintiff's Exhibit P3—(Continued)

PROCEEDINGS

Mr. Hursh: The same stipulation will be entered into.

Mr. O'Hearn: Yes.

NORMAN KERNIS

of lawful age, having been by me, the said Earl W. Radford, as Notary Public as aforesaid, first duly cautioned and sworn to tell the truth, the whole truth and nothing but the truth, in the matter of controversy aforesaid, was examined and did thereupon depose, testify and say as follows, viz.:

Direct Examination

By Mr. Hursh:

Q. Will you state your name?

A. Norman Kernis.

Q. What is your residence?

A. 7633 Essex.

Q. What is your occupation, Mr. Kernis?

A. Jewelry and appliance business. [9]

Q. How long have you been engaged in the jewelry business?

A. Since approximately 1924.

Q. Do you know of Granat Bros.?

A. Yes.

Q. Do you know where they are located?

A. San Francisco, California.

Q. How long have you known of Granat Bros.?

A. My first contact with Granat Bros. was when

Plaintiff's Exhibit P3—(Continued)

(Deposition of Norman Kernis.)

I was with Holland's. I think it dates back to about 1932 or '33 or '34, through those years.

Q. Do you know of the character of the products that Granat Bros. manufactures and sells?

A. It has always been regarded as a high-grade line.

Q. Just what products do they sell?

A. Diamond rings, diamond wedding rings, mountings, gent's wedding rings with diamonds and without diamonds. To my knowledge, that is what they handle at the present time.

Q. Are you familiar with the term "Wed-Lok" used on ring ensembles? A. Yes.

Q. Do you know who produces the Wed-Lok ring [10] ensemble? A. Granat.

Q. How long have you known of the use of the trademark "Wed-Lok" by Granat Bros.?

A. I cannot state the exact length of time, but my recent experience has been the last fifteen or eighteen months. Prior to that I recollect that they had rings that followed the contour of one another, and if my recollection is correct, it goes back to probably 1937 or '38, where they used the term "Wed-Lok" at that time, meaning that the two rings hooked together, or locked together, at that time.

Q. Have you ever advertised Wed-Lok ring ensembles, as selling them from your store?

A. Yes.

Plaintiff's Exhibit P3—(Continued)

(Deposition of Norman Kernis.)

Q. How long have you advertised Wed-Lok ring ensembles?

A. The last fifteen months.

Q. What types of advertising do you employ?

A. Local newspaper, direct-mail, window advertising, displays, and so forth.

Q. How often would you say that you run advertisements in the newspapers where you feature the sale [11] of Wed-Lok ring ensembles?

A. For a while, I think we were running two to three times a week. Recently, possibly once a month. In fact, yesterday we had an ad in the American.

Q. Do you have the advertising material at your store?

A. Yes, I can get it for you.

Q. Will you produce it, please?

A. Yes,. sure.

Q. When you hear the word "lock", either spelled "l-o-k," or "l-o-c-k," used in conjunction with wedding ring and engagement ring ensembles, with whose product do you identify it?

Mr. O'Hearn: I would like to object to that question on the ground that it is immaterial to the issues involved here, because there is no claim made of any trademark on the word "Lok" alone, disassociated from the word "Wed-Lok."

The Witness: My first recollection would be Granat.

Plaintiff's Exhibit P3—(Continued)

(Deposition of Norman Kernis.)

Q. (By Mr. Hursh): Do you also sell Feature rings in your store? [12] A. Yes.

Q. How long have you sold Feature rings in your store?

A. The last five or six years, four or five or six years. I can look up the records, and tell you exactly.

Q. How long have you sold Wed-Lok ring ensembles in your store?

A. Since the inception of the store, September 16, 1939.

Q. You have produced a book of advertisements, and I find here an advertisement.

A. That was in the Southtown Economist.

Q. What date was this advertisement?

A. 10-1-47, and 10-15-47.

Q. And that advertises Wed-Lok rings from Norman. Is that your store?

A. That is right.

Q. And that advertisement appeared in the paper on those dates?

A. Those two specific dates.

Mr. Hursh: There are a number of them. Do you want to take a look at them?

Mr. O'Hearn: Yes. [13]

Mr. Hursh: Inasmuch as Mr. Kernis has these advertisements bound in permanent record form, and desires to retain them, may we stipulate that

Plaintiff's Exhibit P3—(Continued)

(Deposition of Norman Kernis.)

photostats may be substituted in lieu of the originals?

Mr. O'Hearn: It is so stipulated.

Q. (By Mr. Hursh): I find you have the name of the paper and the date written on the back of these advertisements, and in some instances on the page on which the advertisement is attached in the book. Is that your usual business practice in identifying these ads? A. That is right.

Mr. Hursh: I will introduce this one ad, or a photostatic copy of it, as Exhibit 1 of this deposition.

(The advertisement referred to, so offered in evidence, was marked Kernis Deposition Exhibit 1, and a photostatic copy thereof, likewise marked Kernis Deposition Exhibit 1, is attached to and made a part of this deposition.)

The Witness: This is the next ad.

Q. (By Mr. Hursh): The next ad was inserted in what paper, on what dates?

A. In the Herald-American, 9-9-47, 10-29-47, and 10-9-47.

Q. That was placed in the paper, advertising the sale of Wed-Lok rings from your store?

A. Yes, it was placed in that paper, advertising the sale of Wed-Lok rings from our store, and we marked on it "Wed-Lok Rings by Granat."

Q. And it was inserted in that paper on the dates you just mentioned?

Plaintiff's Exhibit P3—(Continued)
(Deposition of Norman Kernis.)

A. That is right.

Mr. Hursh: I will introduce that in evidence as Exhibit 2.

(The advertisement referred to, so offered in evidence, was marked Kernis Deposition Exhibit 2, and a photostatic copy thereof, likewise marked Kernis Deposition Exhibit 2, is attached to and made a part of this deposition.)

The Witness: Here is another ad. [15]

Q. (By Mr. Hursh): You refer to another advertisement. Could you identify that advertisement?

A. Yes. That was run in the Sun.

Q. What date? A. 10-16-47, and 12-18-47.

Mr. Hursh: I will introduce that in evidence as Exhibit 3.

(The advertisement referred to, so offered in evidence, was marked Kernis Deposition Exhibit 3, and a photostatic copy thereof, likewise marked Kernis Deposition Exhibit 3, is attached to and made a part of this deposition.)

Q. (By Mr. Hursh): The next ad is what?

A. Southtown Economist.

Q. What date? A. 11-23-47.

Mr. Hursh: I will introduce that in evidence as Exhibit 4.

Plaintiff's Exhibit P3—(Continued)

(Deposition of Norman Kernis.)

(The advertisement referred to, so offered in evidence, was marked [16] Kernis Deposition Exhibit 4, and a photostatic copy thereof, likewise marked Kernis Deposition Exhibit 4, is attached to and made a part of this deposition.)

The Witness: Here is the next one.

Q. (By Mr. Hursh): On the same page in the book is a second ad, advertising Wed-Lok. Will you state when that was run in the paper?

A. That was in the Southtown Economist, 12-7-47, and 11-30-47.

Mr. Hursh: It is stipulated that we can take a picture of the entire page, and both of these ads will be considered as Exhibit 4?

Mr. O'Hearn: All right.

Q. (By Mr. Hursh): The next ad appears on the opposite page. What paper was that in?

A. Southtown Economist.

Q. What date? A. 12-21-47, and 12-31-47.

Q. And that advertisement states: "Wed-Lok Rings [17] By Granat"? A. Right.

Mr. Hursh: I will introduce that as Exhibit 5.

(The advertisement referred to, so offered in evidence, was marked Kernis Deposition Exhibit 5, and a photostatic copy thereof, likewise marked Kernis Deposition Exhibit 5, is attached to and made a part of this deposition.)

Plaintiff's Exhibit P3—(Continued)

(Deposition of Norman Kernis.)

Q. (By Mr. Hursh): On the next page you have turned to, I find five advertisements of Wed-Lok rings sold at Norman's. Are those advertisements of your store? A. That is right.

Q. And would you identify the first one, as to what paper it appeared in? A. The Sun.

Q. And what dates did it appear?

A. 12-4-47, and 12-7-47.

Mr. Hursh: That particular ad will be marked Exhibit 6-A, appearing on this page, and I offer it in evidence. [18]

(The advertisement referred to, so offered in evidence, was marked Kernis Deposition Exhibit 6-A, and a photostatic copy thereof, likewise marked Kernis Deposition Exhibit 6-A, is attached to and made a part of this deposition.)

Q. (By Mr. Hursh): The next ad appeared in what paper? A. Southtown Economist.

Q. And on what dates?

A. 12-28-47, and 12-31-47.

Mr. Hursh: I will offer that as Exhibit 6-B.

(The advertisement referred to, so offered in evidence, was marked Kernis Deposition Exhibit 6-B, and a photostatic copy thereof, likewise marked Kernis Deposition Exhibit 6-B, is attached to and made a part of this deposition.)

Plaintiff's Exhibit P3—(Continued)

(Deposition of Norman Kernis.)

Q. (By Mr. Hursh): The next ad, what paper?

A. Herald-American. [19]

Q. And the date? A. December 28, 1947.

Mr. Hursh: I will offer that in evidence as Exhibit 6-C.

(The advertisement referred to, so offered in evidence, was marked Kernis Deposition Exhibit 6-C, and a photostatic copy thereof, likewise marked Kernis Deposition Exhibit 6-C, is attached to and made a part of this deposition.)

Q. (By Mr. Hursh): The next ad appeared in what paper? A. The Sun.

Q. What date? A. 11-30-47.

Mr. Hursh: I will offer that as Exhibit 6-D.

(The advertisement referred to, so offered in evidence, was marked Kernis Deposition Exhibit 6-D, and a photostatic copy thereof, likewise marked Kernis Deposition Exhibit 6-D, is attached to and made a part of this deposition.) [20]

Q. (By Mr. Hursh): And the last ad on that page ran in what paper?

A. Herald-American.

Q. On what date? A. 11-20-47.

Mr. Hursh: I will introduce that as Exhibit 6-E.

Plaintiff's Exhibit P3—(Continued)
(Deposition of Norman Kernis.)

(The advertisement referred to, so offered in evidence, was marked Kernis Deposition Exhibit 6-E, and a photostatic copy thereof, likewise marked Kernis Deposition Exhibit 6-E, is attached to and made a part of this deposition.)

Mr. Hursh: It is stipulated that one photostat of the entire page will show all of those five advertisements.

Mr. O'Hearn: All right.

Q. (By Mr. Hursh): On the next page is an ad "Wed-Lok Rings by Norman." That appeared in what paper? A. The Sun.

Q. Under what date? A. 12-22-47. [21]

Mr. Hursh: I will introduce that as Exhibit 7.

(The advertisement referred to, so offered in evidence, was marked Kernis Deposition Exhibit 7, and a photostatic copy thereof, likewise marked Kernis Deposition Exhibit 7, is attached to and made a part of this deposition.)

Q. (By Mr. Hursh): The next advertisement was run in what paper?

A. Herald-American.

Q. On what dates?

A. 12-11-47, 12-4-47, 12-19-47, and 12-22-47.

Mr. Hursh: I will introduce that in evidence as Exhibit 8.

Plaintiff's Exhibit P3—(Continued)
(Deposition of Norman Kernis.)

(The advertisement referred to, so offered in evidence, was marked Kernis Deposition Exhibit 8, and a photostatic copy thereof, likewise marked Kernis Deposition Exhibit 8, is attached to and made a part of this deposition.) [22]

Q. (By Mr. Hursh): The next advertisement appearing in the book ran in what paper?

A. Southtown Economist.

Q. Under what date? A. 10-8-47.

Mr. Hursh: I will introduce that in evidence as Exhibit 9-A.

(The advertisement referred to, so offeed in evidence, was marked Kernis Deposition Exhibit 9-A, and a photostatic copy thereof, likewise marked Kernis Deposition Exhibit 9-A, is attached to and made a part of this deposition.)

Q. (By Mr. Hursh): On the same page is a second ad, advertising Wed-Lok rings by Granat. In what paper did that appear?

A. Southtown Economist.

Q. On what dates?

A. 2-18-48, and 2-22-48.

Mr. Hursh: I will introduce that in evidence as Exhibit 9-B.

Plaintiff's Exhibit P3—(Continued)
(Deposition of Norman Kernis.)

(The advertisement referred to, [23] so offered in evidence, was marked Kernis Deposition Exhibit 9-B, and a photostatic copy thereof, likewise marked Kernis Deposition Exhibit 9-B, is attached to and made a part of this deposition.)

Q. (By Mr. Hursh): The next advertisements, appearing on the next page, will you identify what paper the first one was run in?

A. Sunday Tribune.

Q. What date? A. 5-9-48.

Mr. Hursh: I will introduce that in evidence as Exhibit 10-A.

(The advertisement referred to, so offered in evidence, was mraked Kernis Deposition Exhibit 10-A, and a photostatic copy thereof, likewise marked Kernis Deposition Exhibit 10-A, is attached to and made a part of this deposition.)

Q. (By Mr. Hursh): The next advertisement on the same page appeared [24] in what paper?

A. The Sunday Tribune.

Q. What date? A. 5-23-48.

Mr. Hursh: I will introduce that in evidence as Exhibit 10-B.

(The advertisement referred to, so offered in evidence, was marked Kernis Deposition

Plaintiff's Exhibit P3—(Continued)
(Deposition of Norman Kernis.)

Exhibit 10-B, and a photostatic copy thereof, likewise marked Kernis Deposition Exhibit 10-B, is attached to and made a part of this deposition.)

Q. (By Mr. Hursh): The next advertisement on that page ran in what paper?

A. Southtown Economist.

Q. What date? A. 5-21-48.

Mr. Hursh: I introduce that in evidence as Exhibit 10-C.

(The advertisement referred to, so offered in evidence, was marked Kernis Deposition Exhibit 10-C, [25] and a photostatic copy thereof, likewise marked Kernis Deposition Exhibit 10-C, is attached to and made a part of this deposition.)

Q. (By Mr. Hursh): On the next page there is one ad appearing. Will you state in what paper that ad was run? A. Southtown Economist.

Q. What date? A. 10-13-48.

Mr. Hursh: I will introduce that in evidence as Exhibit 11.

(The advertisement referred to, so offered in evidence, was marked Kernis Deposition Exhibit 11, and a photostatic copy thereof, likewise marked Kernis Deposition Exhibit 11, is attached to and made a part of this deposition.)

Plaintiff's Exhibit P3—(Continued)

(Deposition of Norman Kernis.)

Q. (By Mr. Hursh): The next advertisement was run in what paper?

A. Chicago Tribune.

Q. And on what dates?

A. 8-22-48, and 10-3-48. [26]

Mr. Hursh: I will introduce that in evidence as Exhibit 12.

(The advertisement referred to, so offered in evidence, was marked Kernis Deposition Exhibit 12, and a photostatic copy thereof, likewise marked Kernis Deposition Exhibit 12, is attached to and made a part of this deposition.)

Q. (By Mr. Hursh): The next advertisement in your book was in what paper?

A. Chicago Tribune.

Q. And on what dates?

A. 10-10-48, and 10-17-48.

Mr. Hursh: I will introduce this as Exhibit 13-A.

(The advertisement referred to, so offered in evidence, was marked Kernis Deposition Exhibit 13-A, and a photostatic copy thereof, likewise marked Kernis Deposition Exhibit 13-A, is attached to and made a part of this deposition.) [27]

Q. (By Mr. Hursh): On the same page is a second ad, and this appeared in what paper?

A. Southtown Economist.

Q. What date? A. 10-13-48.

Plaintiff's Exhibit P3—(Continued)

(Deposition of Norman Kernis.)

Mr. Hursh: I will introduce that in evidence as Exhibit 13-B.

(The advertisement referred to, so offered in evidence, was marked Kernis Deposition Exhibit 13-B, and a photostatic copy thereof, likewise marked Kernis Deposition Exhibit 13-B, is attached to and made a part of this deposition.)

Q. (By Mr. Hursh): The next advertisement is a full-page advertisement in the Southtown Economist, dated December 8, 1948, and I notice that you mention Wed-Lok rings in that advertisement.

A. Yes.

Q. Did this advertisement run in the Southtown Economist on Wednesday, December 8, 1948?

A. That is right. [28]

Mr. Hursh: I will introduce that in evidence as Exhibit 14.

(The advertisement referred to, so offered in evidence, was marked Kernis Deposition Exhibit 14, and a photostatic copy thereof, likewise marked Kernis Deposition Exhibit 14, is attached to and made a part of this deposition.)

Q. (By Mr. Hursh): You have produced a two-page advertisement in the Southtown Economist, Wednesday, May 19, 1948. Can you identify the Wed-Lok rings advertised in that advertisement?

A. Yes.

Q. Will you do so, and state what ring ensemble?

Plaintiff's Exhibit P3—(Continued)
(Deposition of Norman Kernis.)

A. Ring ensembles numbers 4, 5, and 6.

Mr. Hursh: I will introduce that in evidence as Exhibit 15.

(The advertisement referred to, so offered in evidence, was marked Kernis Deposition Exhibit 15, and a photostatic copy thereof, likewise marked Kernis Deposition [29] Exhibit 15, is attached to and made a part of this deposition.)

Q. (By Mr. Hursh): You have another advertisement here. In what paper was that run?

A. In The Chicago Tribune.

Q. And on what dates?

A. We can check that from the invoices. I can check it if you want me to, check the bill on it, a full-page advertisement in The Chicago Tribune.

Q. It evidently was around Christmas, wasn't it?

A. That is right.

Q. Because you have a picture of Santa Claus, and pine cones.

A. I think about two weeks before Christmas.

Q. In 1948?

A. That is right. Here it is. The Sunday Tribune, 12-12-48.

Q. And this page from The Chicago Tribune, was run in what paper, and on what date?

A. Chicago Sunday Tribune, 12-12-48.

Mr. Hursh: I will introduce that in evidence as Exhibit 16.

Plaintiff's Exhibit P3—(Continued)
(Deposition of Norman Kernis.)

(The advertisement referred to, [30] so offered in evidence, was marked Kernis Deposition Exhibit 16, and a photostatic copy thereof, likewise marked Kernis Deposition Exhibit 16, is attached to and made a part of this deposition.)

The Witness: This one is yesterday's American.

Q. (By Mr. Hursh): You have produced an advertisement in the Chicago Herald-American, Thursday, February 10, 1949?

A. That is right.

Q. "Wed-Lok Diamond Rings From Norman," and that advertisement was run by your company on that date? A. Right.

Mr. Hursh: I will introduce that as Exhibit 17.

(The advertisement referred to, so offered in evidence, was marked Kernis Deposition Exhibit 17, and a photostatic copy thereof, likewise marked Kernis Deposition Exhibit 17, is attached to and made a part of this deposition.)

Q. (By Mr. Hursh): I believe you testified that you have handled the Feature ring for a number of years? A. Yes.

Q. Prior to the advent of the Feature-Lock ring ensemble coming to your attention, did you ever know of any other ring ensemble in the market employing the word "lok" other than the Wed-Lok ring ensemble? A. No.

Plaintiff's Exhibit P3—(Continued)

(Deposition of Norman Kernis.)

Q. You are familiar, are you not, with the quality of the products manufactured by Granat Bros.?

A. Yes.

Q. Would you state just what quality of product Granat Bros. manufactures?

A. A very fine quality product.

Q. Are you familiar with the quality of merchandise produced by Feature Ring Co.?

A. Yes.

Q. Will you compare the quality of merchandise manufactured and sold by Granat Bros., under the trade-mark "Wed-Lok," with the quality of merchandise manufactured and sold by the Feature Ring Co., under the trade-mark "Feature-Lock"?

Mr. O'Hearn: Are you introducing Mr. Kernis as an expert?

Mr. Hursh: I am qualifying him as one who has long been in the jewelry business, and, with this long association in the jewelry business, he is able to speak as to the quality of various pieces of jewelry, I do not consider him to be an expert so far as this case is concerned in any manner at all, except through his long familiarity with the jewelry business.

Mr. O'Hearn: I object to the question as calling for an opinion.

The Witness: To my knowledge, a ring that is die-struck will be a better piece of merchandise for the customer than a cast ring.

Plaintiff's Exhibit P3—(Continued)

(Deposition of Norman Kernis.)

In die-striking a ring, you roll out the metal, and hereby the molecules of the metal are very close together.

In a cast ring, through centrifugal force, you cannot get the molecules as close together, and your ring thereby is more or less porous to some degree, the molecules are not as close together. [33]

In a die-struck ring, the ring is apt to crack or break by being brittle; also that depends upon the alloying of the gold. You get a better finish and polish on a ring that is die-struck, because the metal seems to be harder, which you cannot get with a cast ring, the metal is not as hard, and if it is the least porous, every porous mark will show on the surface of it.

Q. (By Mr. Hursh): What type of ring does Granat Bros. produce?

A. They have a die-struck ring.

Q. What type ring does Feature-Lock produce?

A. Cast.

Q. Do you have customers come into your store and ask for Wed-Lok ring ensembles?

A. Yes.

Q. Do you know how often this happens?

A. I couldn't say the exact number of times, but it is during the daily course of our business.

Q. In your sale of Wed-Lok rings, do you consider the word "Lok" of that trade-mark "Wed-Lok" to be a valuable part of the trade-mark?

Plaintiff's Exhibit P3—(Continued)
(Deposition of Norman Kernis.)

A. Definitely so.

Q. Do you consider the word "Lok" to be a dominant [34] part of the trade-mark "Wed-Lok?"

A. Yes.

Q. Do you know what reputation Granat Bros. enjoys in this Chicago area?

A. I know that their line is not handled promiscuously, and therefore I myself deem it a line of great value to an individual store. I understand that some of what we call the finer stores have them in Chicago, like Marshall Field's, and if I am not mistaken, Goldstein has it, out in South Chicago, which has a good reputation. Kirchberg, in Chicago, also has a good reputation, and maybe others. I am not too familiar with how many different people they have in this area.

Mr. Hursh: I believe that is all.

Cross-Examination

By Mr. O'Hearn:

Q. Will you tell me what this Southtown Economist paper is? Is it a weekly paper, or a daily paper?

A. It comes out twice a week. They have a Wednesday issue, and they have a Sunday issue.

Q. What is the Herald-American?

A. The Herald-American is a daily metropolitan [35] Chicago paper.

Q. Would you check and find out the date of the

Plaintiff's Exhibit P3—(Continued)
(Deposition of Norman Kernis.)

earliest advertisement of those exhibits that were just put in, or do you know offhand?

A. I don't know offhand, but I gave them to you as they were registered in the book. Some, I noticed, were out of sequence. The book possibly was rearranged when they put it together, and they used the same ad, maybe, in a number of different papers, so they ran after each other.

Q. I wonder if you could just take time and see if you could determine, roughly, the earliest date.

A. This book only goes back to a certain date, you understand. We may have had ads prior with which I am not familiar. Now, 9-9-47, I believe, was the first ad that we ran.

Q. (By Mr. Hursh): You are referring to Exhibit 2?

A. Exhibit 2, that is right.

I will look further, and see if there is an earlier one. I think that is the first one.

Q. (By Mr. O'Hearn): Is that about the length of time that you have been handling the Wed-Lok rings? [36]

A. I had the wedding rings prior to that, only a different type of Wed-Lok, the rings wrapped around one another, instead of being locked together like they are today.

Q. They were also sold under the trade-mark "Wed-Lok"? A. That is right.

Plaintiff's Exhibit P3—(Continued)

(Deposition of Norman Kernis.)

Q. Do you carry other Granat merchandise, other than Wed-Lok?

A. At the present time, I am only featuring the Wed-Lok series. I don't buy any of the other.

Q. Have you ever at any time sold any of the other Granat merchandise?

A. Yes. When I first started September 16, 1939, I purchased others.

Q. To your knowledge, was the Wed-Lok name applied to these interlocking rings to distinguish them from the other types of merchandise sold by Granat Bros.?

A. I think it was the principle, mainly, of it locking together that sold it at the time.

Q. You mentioned the fact that you considered the word "Lok" an important part of the trade-mark. Will you explain why you consider it an important [37] part of the trade-mark?

A. I think it is the only way, myself, that I could identify the feature of both rings locking together, and not being able to turn away from one another.

Q. Would you say that the trade-mark "Wed-Lok" characterizes the type of ring that is sold under that mark?

A. Characterizes the type of ring? I think it signifies that a locking feature is involved in there.

Q. Do you know of any other interlocking wedding and engagement ring sets that are sold under a trade-mark with the word "lock" in the mark, other than "Wed-Lok", or "Feature-Lock"?

Plaintiff's Exhibit P3—(Continued)

(Deposition of Norman Kernis.)

A. I don't now them by name. I know there are others on the market.

Q. How long have you known that there were others?

A. It seems that this type took hold last spring, and others came out with ideas of that, but the only way I noticed it was when I went through the trade magazine, that I saw them, but I didn't pay any attention to them. I was satisfied with the types that we handle. [38]

Q. Were you familiar with Wed-Lok for some time prior to this? A. Yes.

Q. Is that the reason that you would consider that Granat Bros. would be the first name to come to your mind when you heard or saw a mark with the word "lock" in it? A. That is right.

Q. Do you vouch for and stand behind merchandise that you sell in your store?

A. Definitely so.

In fact, if you check our record with the Better Business Bureau, or the Jewelers' Association, you will see that we bear a very fine reputation.

Q. You would not sell any product, therefore, that you did not consider to be a high-quality product?

A. We carry merchandise in different price categories. I don't know what you mean by "high quality."

Q. For the price that is charged for it, you

Plaintiff's Exhibit P3—(Continued)
(Deposition of Norman Kernis.)

would consider it worth the money, good merchandise for the money that is charged for it?

A. It is merchandise that is worth the value, it is comparable [39] to other lines of the same category, yes. We carry silver plate, and we carry sterling silver. You cannot compare silver plate to sterling silver, yet we meet that particular market, although that is too wide of a spread, when you take the other things.

Q. I quote from the advertisement, marked Exhibit 1, attached to this deposition:

"Wed-Lok Rings"—then, leaving out some intervening words,—"for wedding band and engagement ring lock together . . .," the words "lock together" are italicized. Would you say that the word "Wed-Lok" in the advertisement was descriptive of the type of ring that is sold, namely, the interlocking type of ring?

A. I don't think I can answer that question.

Mr. Hursh: Possibly it is indefinite. If you do not understand the question, Mr. Kernis, you have the right to ask counsel to make it understandable and definite to you.

The Witness: You say you have got "Wed-Lok." To me, that would just be a trade name. I don't think it signifies [40] anything like material. It is a trade name for a certain product. I couldn't say it signifies anything. It would be a trade name,

Plaintiff's Exhibit P3—(Continued)

(Deposition of Norman Kernis.)

in my understanding, unless I am not answering the question properly.

Mr. Hursh: I think that is a proper answer.

Q. (By Mr. O'Hearn): Would not a ring set sold under a trade-mark which included the word "lock" signify to you an interlocking type of ring?

A. Now it would, since Granat's existence, you understand. Maybe prior to that, it wouldn't have.

Q. I notice that in every advertisement, Exhibits Nos. 1, 2, 3, and No. 4, the one in the lower lefthand corner of the page, and No. 5, the word "locked," or the words "lock together," are italicized in the advertisement.

A. That is a Granat mat there, you understand, and that is the way they submitted it to us. We just got some new mats in. We can check and see if they are all of the same type. They have a mat service, and they are submitted.

Mr. O'Hearn: I think that is all. [41]

Redirect Examination

By Mr. Hursh:

Q. Mr. Kernis, is the Chicago Tribune a daily Chicago paper?

A. The Tribune is a daily Chicago paper. Those advertisements that were run in the Tribune were run in what they call the Metro section of the Tribune, which is a special section. The City is split into different sections, I believe it is split

Plaintiff's Exhibit P3—(Continued)
(Deposition of Norman Kernis.)

into five sections, and we advertise in the Southwest section of the Tribune.

Q. And the Herald-American, is that a daily paper?

A. That is a daily paper that is throughout Chicago.

Q. And The Sun?

A. The Sun is a daily paper throughout Chicago.

Q. The Southtown Economist is what type of paper?

A. That runs west of State Street, I think to about 5500, north of here, and the City Limits south, and I think west it goes to the City Limits.

Mr. Hursh: That is all.

Recross-Examination

By Mr. O'Hearn:

Q. I think I recall your mentioning that you have [42] handled Wed-Lok rings since about 1939.

A. Yes, but it was a different type then. They had it where it followed the curvature of the ring; if the ring was curved, then it followed the curve of the ring, and they held together that way, although I can't say they were locked together. They held together. It depends on how you want to use that descriptive word.

Q. Did you continue to sell interlocking rings, whether or not they were of the actual interlocking

Plaintiff's Exhibit P3—(Continued)

(Deposition of Norman Kernis.)

type, or merely of the conforming type, during the war years?

A. No. The only time we went back into it was when Granat came out with the new Wed-Lok, we made matching rings, but not where they held together that way.

Q. The rings that were matched but not held together were not sold under the name "Wed-Lok," were they? A. No, definitely.

Q. (By Mr. Hursh): You are referring to the rings you made yourself?

A. The rings we made ourselves. We didn't do much with Granat during the war years, because Granat wanted to sell their goods mounted, you understand, and we mounted all our own goods, but, of course, the Wed-Lok series we buy completely mounted, with the diamonds in, so, during the war years, we didn't have much business with Granat. Before the war years, and after the war years, we did a swell job. In fact, today, we sold a set, five hundred and some dollars.

Mr. O'Hearn: That is all.

Mr. Hursh: That is all.

It is stipulated by and between counsel that Mr. Kernis will not have to read and sign the deposition.

Mr. O'Hearn: It is so stipulated.

Q. (By Mr. Hursh): Mr. Kernis, will you waive the reading and signing of your deposition?

A. Yes.

Plaintiff's Exhibit P3—(Continued)

(Deposition of Norman Kernis.)

(Signature waived.)

The reading of his foregoing fully transcribed deposition, and the signing thereof by the said witness, Norman Kernis, were by stipulation by and between counsel [44] for the parties, and by the witness, duly waived.

[Seal] /s/ EARL W. RADFORD,
Notary Public,
DuPage County, Illinois.

My Commission expires September 8, 1949.

[Endorsed]: Filed Mar. 16, 1949. [45]

PLAINTIFF'S EXHIBIT Q3

[Title of District Court and Causes.]

Deposition of Harry Gamler taken at 522 Main Street, Buffalo, New York, before Carmen S. DePaolo, Notary Public, on Monday, February 14th, 1949, at 1:00 p.m.

Appearances:

MELLIN AND HANSCOM, by

JACK E. HURSH, ESQ.,
391 Sutter Street, Suite 500,
San Francisco 8, California,
Attorneys for Plaintiff.

FISH, RICHARDSON & NEAVE,
20 Exchange Place,
New York City, N. Y., by

WILLIAM J. O'HEARN, ESQ.,
Attorneys for Defendants.

Mr. Hursh: It is stipulated that a copy of the notice of taking of deposition may be attached to this deposition, the original of the notice having been attached to the depositions that were taken at Portland, Oregon. It is also stipulated that the reporter may take the deposition in shorthand and thereafter transcribe it into typewritten form for filing with the court, and it is further [2*] stipulated that all objections to the questions except as to form are reserved until the time of trial, and it is also stipulated that the deposition was postponed

* Page numbering appearing at top of page of original certified Transcript of Record.

Plaintiff's Exhibit Q3—(Continued)

by mutual consent of counsel from 11 a.m. as noticed on the depositions to 1 p.m.

HARRY GAMLER

called by Plaintiff and sworn, testified as follows:

Direct Examination

By Mr. Hursh:

Q. Will you state your name, please?

A. Harry Gamler.

Q. What is your residence?

A. 1290 Delaware.

Q. In Buffalo?

A. Apartment 3A; Buffalo, New York.

Q. And what is your occupation, Mr. Gamler?

A. Jeweler. [3]

Q. And how long have you been in the jewelry business?

A. Since—let me see—oh, I would say roughly about 1905.

Q. And do you know of a firm of manufacturing jewelers by the name of Granat Brothers?

A. I do.

Q. And how long have you known of Granat Brothers?

A. Roughly I would say about twenty years.

Q. And do you know what products Granat Brothers manufacture and sell?

A. Well, they sell diamond rings, wedding rings, and Wed-Loks.

Plaintiff's Exhibit Q3—(Continued)

(Deposition of Harry Gamler.)

Q. Have you heard of the trade-mark "Wed-Lok" used in connection with wedding ring-engagement ring ensembles? A. Yes.

Q. Whose product or products are identified by the use of the trade-mark "Wed-Lok"?

A. Granat.

Q. How long have you known of the trade-mark "Wed-Lok" used in conjunction with ring ensembles?

A. You mean "Wed-Lok" you are talking about?

Q. Yes, Wed-Lok rings. [4]

A. Oh, I would say before the war; I can't tell you the definite date.

Q. Do you sell Wed-Lok rings in your store?

A. We do.

Q. Do you know the quality of Granat Brothers products, Mr. Gamler? A. I do.

Q. What is that quality?

A. Well, they are supposed to represent the finest ring manufactured; it is supposed to be the best as far as they are concerned in the jewelry industry.

Q. What is the quality of the Wed-Lok ring ensemble?

A. You mean the—well, you mean the patent end of it?

Q. No, just the ring ensemble itself?

Plaintiff's Exhibit Q3—(Continued)

(Deposition of Harry Gamler.)

A. I would say it is the finest made in that particular line.

Q. How long have you been selling Wed-Lok rings in your store?

A. I can't remember. I have to look up the ad. (Looking at papers.) I think we have an announcement [5] here, I think it is September; the first ad I believe came out September 3rd, 1947.

Q. And do you advertise the sale of Wed-Lok rings in your store? A. We do.

Q. And will you please produce the advertising material that you have been able to gather?

A. I have it right here.

Q. I show you a photostatic copy of an advertisement of the Buffalo Evening News for Wednesday, September 3, 1947 advertising Wed-Lok rings from Gamler's. Will you state whether that ad appeared in that paper on that date?

A. Correct.

Q. Does it advertise the sale of Wed-Lok rings from your store? A. Yes.

Mr. Hursh: I will introduce that in evidence as Exhibit 1 to this deposition. Can we introduce this the way it is, Mr. Gamler?

The Witness: Yes.

Mr. Hursh: Will you mark it Exhibit 1, Mr. Stenographer? [6]

Plaintiff's Exhibit Q3—(Continued)

(Deposition of Harry Gamler.)

(Photostatic copy of advertisement of the Buffalo Evening News for Wednesday, September 3, 1947 advertising Wed-Lok rings from Gamler's marked Exhibit 1.)

Q. (By Mr. Hursh): I show you an advertisement that has the pencil notation on it "News, 5/28/48" advertising Wed-Lok diamond rings by Granat, and I ask you if your company placed that ad in the Buffalo papers on the date appearing?

A. Correct.

Q. And what paper did that appear in?

A. Buffalo Evening News.

Mr. Hursh: I will introduce that advertisement as Exhibit 2.

(Advertisement with pencil notation "News 5/28/48" advertising Wed-Lok Diamond Rings by Granat, marked Exhibit 2.)

Q. (By Mr. Hursh): You have produced another advertisement of the [7] Buffalo Courier-Express, Sunday, June 20, 1948, advertising the sale of Wed-Lok rings. Did your company place that advertisement in that paper?

A. Yes. Whatever it says there is correct.

Mr. Hursh: I will introduce that advertisement as Exhibit 3.

(Advertisement of Buffalo Courier-Express dated Sunday, June 20, 1948, marked Exhibit 3.)

Plaintiff's Exhibit Q3—(Continued)

(Deposition of Harry Gamler.)

Q. (By Mr. Hursh): You have produced an advertisement of the Buffalo Evening News, Wednesday, June 23, 1948 advertising Wed-Lok rings. Did your company place that advertisement in the papers on that date? A. Correct.

Mr. Hursh: I will introduce that as Exhibit 4.

(Photostatic copy of Gamler's ad in Buffalo Evening News, dated Wednesday, June 23, 1948, marked Exhibit 4.)

Q. (By Mr. Hursh): Another ad that you have produced is one that [8] appeared in the Buffalo Evening News, Friday, July 23, 1948. I will ask you if that ad was placed in that paper on that date by your company? A. Correct.

Mr. Hursh: I will introduce that advertisement as Exhibit 5.

(Photostatic copy of advertisement in Buffalo Evening News, Friday, July 23, 1948, marked Exhibit 5.)

Q. (By Mr. Hursh): And you have produced an advertisement that appeared in the Buffalo Evening News, Wednesday, February 9, 1949 advertising "Serenade Series Wed-Lok Diamond Rings by Granat." Did your company place that ad in the paper on that date? A. It did

Mr. Hursh: I will introduce that advertisement as Exhibit 6.

Plaintiff's Exhibit Q3—(Continued)
(Deposition of Harry Gamler.)

(Gamler's advertisement in Buffalo Evening News, Wednesday, February 9, 1949 marked Exhibit 6.) [9]

Q. (By Mr. Hursh): I notice that in these advertisements that have been introduced in evidence as Exhibits 1 to 6 inclusive that you have in each instance mentioned the fact that the Wed-Lok ring is a Granat ring. Is that your customary practice?

A. Yes, all Granat.

Q. And what other methods of advertising do you employ?

A. Well, we have radio, direct mail, bill posters and television.

Q. I notice on Exhibit 6 you mention the following: "See the Serenade Wed-Lok Diamond Rings on Television Tonight WBEN-TV Channel 4." Will you state what that wording means on this advertisement?

A. That means that these people who are on television, we have given them a Granat Wed-Lok set of this particular design, Serenade, and they have shown the public through television how it operates with the opening and closing Wed-Lok and things like that.

Q. How long have you been advertising Wed-Lok rings by radio? [10]

A. Oh, I would say about the same that we have announced it in the newspaper. In fact, we tie it

Plaintiff's Exhibit Q3—(Continued)
(Deposition of Harry Gamler.)

up with putting this here (indicating); when we announce it in the newspaper, we also announce it at the same time over the radio so it ties up.

Q. That would be approximately September 3rd, 1947? A. Around that particular time.

Q. And you have also produced a pamphlet entitled "Wed-Lok Rings by Granat." Is that a pamphlet that you employ in your store?

A. Correct.

Q. And how do you employ that pamphlet in advertising Wed-Lok rings in your store?

A. Well, we send them out in the mail, direct mail, and we give them out on the counter; that is about all; we send them our direct mail and give them out at the counter in the store.

Q. About how many of these pamphlets did you use last year?

A. Roughly I would say over five thousand.

Q. Over five thousand? A. Yes. [11]

Mr. Hursh: I will introduce the pamphlet as Exhibit 7.

(Pamphlet entitled "Wed-Lok Rings by Granat" marked Exhibit 7.)

Q. (By Mr. Hursh): I noticed on my way into your store that you have quite a large sign on the outside of your building advertising Wed-Lok rings? A. Yes.

Q. When was that sign placed on your store?

Plaintiff's Exhibit Q3—(Continued)
(Deposition of Harry Gamler.)

A. Last year, some time last year.

Q. Would you say that it was the early part of last year?

A. I couldn't definitely say exactly. I haven't got the date on it.

Q. You have produced a photostatic copy of a photograph showing your store and the sign——

A. I can find out by calling up the people who painted the sign; they would have the bill and the date of the bill.

Q. ——is that a picture of your store showing the [12] Wed-Lok sign? A. Correct.

Mr. Hursh: I will introduce that photograph as Exhibit 8.

(Photograph of store and sign advertising Wed-Lok Diamond rings marked Exhibit 8.)

Q. (By Mr. Hursh): Where in Buffalo is your store located? A. What do you mean?

Q. What is the exact position of your store?

A. 522 Main Street, corner of Genesee.

Q. That is the corner of Main and Genesee?

A. Correct.

Q. Where is that with relation to the shopping center of Buffalo?

A. That is the heart of Buffalo.

Q. How often do you advertise by radio?

A. We are on the radio every day on all stations.

Q. How often would you say your sale of the

Plaintiff's Exhibit Q3—(Continued)

(Deposition of Harry Gamler.)

Granat Wed-Lok ring ensemble is mentioned on your radio programs?

A. Well, whenever we run an ad, we generally tie it up. [13]

Q. How often do you run newspaper advertisements?

A. Anywhere from one to three times a week.

Q. And how often in those newspaper advertisements do you feature the sale of Wed-Lok rings?

A. Well, just what I showed you right there in those newspaper ads; that is, you can see for yourself whatever I have shown you.

Q. In your television program how often do you advertise the sale of Wed-Lok rings from your store?

A. Well, television has only been about a month or five weeks and I think we had it on three times.

Mr. Hursh: It is hereby stipulated by and between counsel that the radio script mentioning the trade-mark "Wed-Lok" may be introduced in evidence as the exhibit next in number which will be Exhibit 9. The reason for not introducing the script during the deposition is the fact that Mr. Gamler has not as yet received the script from his advertising man and that the same is now on its way to his store and as soon as it is received the particular script referring [14] to Wed-Lok ring ensembles will be introduced and it will be attached as a regular exhibit to the deposition.

Plaintiff's Exhibit Q3—(Continued)

(Deposition of Harry Gamler.)

(Three radio scripts advertising Wed-Lok rings marked Exhibits 9, 9A, and 9B.)

Q. (By Mr. Hursh): Mr. Gamler, will you tell us what radio stations your radio advertising has been transmitted over?

A. WBEN, WGR, WEBR, WBNY and I believe it is WKBW.

Q. When you hear the word "Wed-Lok," either spelled "Lok" or "Lock" used in conjunction with rings and ring ensembles, with whose products do you identify it?

Mr. O'Hearn: I object to that question on the ground that it does not come within the pleadings since there is no claim made of a trade-mark of the word "Lok" or "Lock" aside from the trade-mark "Wed-Lok." A. Granat.

Q. (By Mr. Hursh): Do you have customers come into your store and ask for Wed-Lok rings by that name? [15] A. We do.

Q. How often does this occur?

A. Well, they come in quite often; I couldn't say definitely because I am not on the floor most of the time.

Q. In your sale of Wed-Lok rings in your store would you state whether or not the word "Lok" is a valuable part of that trade-mark? A. Yes.

Q. Would you state whether or not the word "Lok" is a dominant part of that trade-mark?

A. Yes.

Plaintiff's Exhibit Q3—(Continued)

(Deposition of Harry Gamler.)

Q. Do you know the reputation that Granat Brothers' products has in the Buffalo area?

A. I would say that they have the finest reputation not only in the Buffalo area but wherever its rings are sold.

Q. Have you ever seen a Feature-Lok ring ensemble? A. I have.

Q. And under what circumstances did you see Feature-Lok ring ensembles?

A. Well, we had a couple of jobbers who came through here last year with the Feature-Lok ring and [16] I looked at them and compared them with our product and there was no comparison.

Q. And when you state that there was no comparison, will you amplify that and tell us the difference?

A. Well, the quality of the ring itself, the make of the ring—well, I can't explain it—all I can say is there is no comparison to the quality of the ring itself, the casting and the make.

Q. Which ring would you state would be the better quality? A. Between what?

Q. Between the Feature-Lok ring and the Granat Wed-Lok?

A. I would say by all means the Granat.

Q. Up until the time you saw the Feature-Lok ring did you ever hear of a ring or ring ensemble sold where part of the name under which it was sold employed the use of "Lok"? Strike that ques-

Plaintiff's Exhibit Q3—(Continued)

(Deposition of Harry Gamler.)

tion out please. Prior to the time you saw the Feature-Lok ring, had you ever seen a ring ensemble other than that manufactured by Granat Brothers that employed the word "Lok" in conjunction with the trade name or trade-mark under which it was sold? A. I did not. [17]

Mr. Hursh: That is all of the direct examination.

Cross-Examination

By Mr. O'Hearn:

Q. Mr. Gamler, are you familiar with the fact that Granat Brothers sells other products than the Wed-Lok ring ensemble?

A. I am familiar with it.

Q. Do you handle the other products?

A. We do.

Q. The name "Wed-Lok" is never used in conjunction with the products which Granat Brothers sells other than the interlocking ring sets, is it?

A. Will you repeat that, please? You mean the Wed-Lok ring; is that what you mean?

Q. The name "Wed-Lok" is only used only with what you call the Wed-Lok ring? A. Yes.

Q. The name "Wed-Lok" then was adopted by Granat Brothers to distinguish this interlocking ring from its other products, was it not?

Mr. Hursh: I object to that question in that it is asking for hearsay on the part of Mr. Gamler. I don't think he would know what was in the mind

Plaintiff's Exhibit Q3—(Continued)

(Deposition of Harry Gamler.)

of Granat Brothers when they adopted this trademark.

Mr. O'Hearn: I will withdraw the question.

Q. To you does the name "Wed-Lok" distinguish the interlocking ring sets from the other products that Granat Brothers sells? A. Yes.

Q. Would you say that the name "Wed-Lok" characterizes the function of the interlocking ring sets?

A. Will you explain to me again the meaning of that because I don't get the drift of the question?

Q. In marketing or putting a new product on the market would you consider it important to give the product a name which signifies to the public something as to the type of product it is?

A. Well, I don't know what Granat had in mind because you are asking me something that they had in mind to market. You want to find out whether Wed-Lok is a feature of the ring?

Q. Would you say that the name "Wed-Lok" is descriptive of the type of ring which is sold under that name?

A. The Wed-Lok—you mean the Wed-Lok, you call it [19] descriptive of the ring itself?

Q. Yes.

A. No, I don't think it is descriptive; no, I say Wed-Lok is descriptive of the two rings together and that is the only thing I can say and it is sold as two; they cannot be sold apart.

Plaintiff's Exhibit Q3—(Continued)

(Deposition of Harry Gamler.)

Q. Would you say the name "Wed-Lok" is descriptive of the two when considered together as an interlocking ring set?

Mr. Hursh: I object to that question on the ground that it is indefinite. The question is not directed as to whether we are discussing the interlocking means or discussing the ring as a wedding ring and an engagement ring and until the particular definition of what you apply your question is clarified, I don't believe the witness can understand the question.

Mr. O'Hearn: Would you repeat the question, Mr. Stenographer, and see if the witness has any trouble understanding?

The Witness: Will you repeat it again?

(The Stenographer repeated the last question.) [20]

Q. By that I mean the two rings, the wedding ring and the engagement.

A. When together, they are known as "Wed-Lok."

Q. Would you consider that name descriptive of the two rings when sold together as a ring set?

A. What is the meaning of "descriptive"; what does that mean?

Q. Do you think it describes the function of the two rings?

A. The word "Wed-Lok"—do you mean the word "Wed-Lok," does that describe—I don't know

Plaintiff's Exhibit Q3—(Continued)
(Deposition of Harry Gamler.)

how the customer will take it. All I know is that we are following their advertising and we have to go accordingly. I wouldn't know how to answer that question because I don't know.

Q. I quote from the advertisement marked Exhibit 1 in this deposition: "Announcing Wed-Lok," and then there is something left out, and then: "but a tiny gesture locks them together," and "locks them together" is italicized. Would you say that the name "Wed-Lok" in connection with the words which I have quoted from this advertisement are descriptive of the ring set which is sold under [21] the name "Wed-Lok"?

A. Whatever it says; I haven't read the ad; I suppose the ad must be correct.

Q. But as written would you say it was descriptive of the ring set?

Mr. Hursh: What are you referring to? I object to that question as unintelligible. You don't state whether you are referring to the trade mark "Wed-Lok" or the descriptive matter employed in the advertisement itself.

Mr. O'Hearn: I believe the question reads the name "Wed-Lok" in connection with the rest of the words quoted from the advertisement. Would you repeat the question, Mr. Stenographer?

(Stenographer repeated the question as follows:)

Plaintiff's Exhibit Q3—(Continued)

(Deposition of Harry Gamler.)

"Q. I quote from the advertisement marked Exhibit 1 in this deposition: 'Announcing Wed-Lok,' and then there is something left out, and then: 'but a tiny gesture locks them together,' and 'locks them together' is italicized. Would you say that the word 'Wed-Lok' in connection with the words which I have quoted from this advertisement are descriptive [22] of the ring set which is sold under the name 'Wed-Lok'."

A. Well, according to the paper, it would be whatever the paper says because, you see, when we get those ads, we copy those ads as they send them to us and that is all I know it. We have to go according to their advertising.

Mr. Hursh: I still don't think the question is intelligible. I don't think the answer is responsive.

Mr. O'Hearn: I was asking for your opinion—not your opinion but what you get from reading the advertisement. Does it signify to you a locking type of ring set, the name "Wed-Lok"?

The Witness: A locking type? The word "Wed-Lok"? Well, if you look at the ring, it has a locking feature in there that locks the ring and the word "Wed-Lok" characterizes the word "Granat."

Q. (By Mr. O'Hearn): You consider the word "Lok" an important part of the trade mark. Will you explain why you consider it an important part of the trade mark? [23]

Plaintiff's Exhibit Q3—(Continued)
(Deposition of Harry Gamler.)

A. Well, I have known of the company. In other words, it has great features in that ring.

Q. You mean the locking feature is important?

A. Well, the ring itself, the way it is made, the way the ring is finished, the way it is put together and everything in connection with Granat products.

Q. Why do you consider the word "Lok" to be an important part of the name "Wed-Lok"?

A. Well, that is something you have to ask Granat; they pass this thing on to us and we know it is a great feature because it is a locking set.

Mr. Hursh: That particular feature of the ring is a lock?

The Witness: That is what I thought it was.

Q. (By Mr. O'Hearn): Mr. Gamler, you mentioned that you are familiar with the name "Feature-Lok." Are you familiar with any interlocking ring sets that are sold under trade marks which include the name "Lok"?

A. Well, I will tell you what happened: I happened to read some trade journals and I saw different locks and at the beginning I thought they were all Granat products until I have written to Granat and [24] asked them for an explanation and they told me that they only manufacture the Granat only; that is as far as I know.

Mr. Hursh: You mean the Wed-Lok?

The Witness: Wed-Lok, yes, and then I began

Plaintiff's Exhibit Q3—(Continued)
(Deposition of Harry Gamler.)

to realize that the other ones were infringing as I thought it was at the time; I didn't know.

Mr. O'Hearn: I move to strike the last part of that answer as not responsive to the question.

Q. (By Mr. O'Hearn): Was that prior to the time that you were approached by the jobbers selling Feature-Lok?

A. You mean the other locks?

Q. That you heard of, other rings?

A. No. The first Feature-Lok that I heard about—in fact, one of our jobbers that we do business with, in fact, our jobbers brought it into us, and another jobber brought it into us and tried to sell us a Feature-Lok and I asked them a lot of questions; how can they interfere with the Granat line? So naturally they are jobbers and I told them I wouldn't be interested in them. [25]

Q. At that time had you heard of any other interlocking ring sets sold under any trade marks?

A. Granat locks was the first one we were interested in and we took the line on.

Q. But at the time you were approached by jobbers selling Feature-Lok had you heard of any other? A. No, I did not.

Q. When you first heard of the Feature-Lok line, did you believe that it was a product of Granat Brothers ?

A. When I saw the ring I knew it wasn't because it was marked "Feature-Lok."

Plaintiff's Exhibit Q3—(Continued)

(Deposition of Harry Gamler.)

Q. Can you recall and tell me the names of any other interlocking ring sets that you are now familiar with that are sold under a trade mark which includes the word "Lok"?

A. Offhand I can't remember.

Q. Are you familiar with the name "Gemlock" which is sold by the Gemex Company in Newark, New Jersey? A. No.

Q. Are you familiar with the name "Turn-lok" which is also sold by the Gemex Company in Newark, New Jersey? [26] A. No.

Q. Are you familiar with the name "Dubl-Lock"? A. No.

Q. Are you familiar with the name "Nu-Lock" owned by the Freeman-Daughaday Company?

A. No.

Q. Are you familiar with the name "Like-Lok" owned by Manne and Sons? A. No, sir.

Q. Are you familiar with "Dove Tail Lok"?

A. No.

Q. Are you familiar with the name "Snap-Lock" owned by the Royal Jewelry Stores?

A. No, sir.

Q. Are you familiar with the name "Invisible Lok"? A. No.

Q. Are you familiar with the fact that the T. C. Tanke Company of 557 Main Street, Buffalo, New York, sells an interlocking ring set under the name "Invisible-Lok"?

Plaintiff's Exhibit Q3—(Continued)

(Deposition of Harry Gamler.)

A. I am not.

Q. You are familiar with the T. C. Tanke Company here in Buffalo? [27]

A. Very well.

Q. Are you familiar with the fact that a jewelry store by the name of Leininger at 617 Main Street, Buffalo, sells the Feature-Lok ring?

A. Not at all. I never see their ads; I wouldn't know.

Q. At the time that you first heard of the name "Wed-Lok" you had not at that time heard of any other interlocking ring sold under a trade mark including the word "Lok"? A. No.

Q. Is that why the name "Wed-Lok" or any other ring sold under a trade mark including the name "Lok" first signifies to you the Granat Company?

A. Well, we have been buying Granat Brothers products and when they came out with that feature, we put in that line.

Q. Mr. Gamler, when were you first approached in connection with this suit?

A. When was I approached in connection with this suit?

Q. Yes.

A. I think about ten days ago or so. [28]

Q. By whom were you first approached?

A. Not in person; Mr. Granat, I believe, sent

Plaintiff's Exhibit Q3—(Continued)
(Deposition of Harry Gamler.)

out a letter and told me that there was a suit pending; that is all I know.

Q. When were you next approached by anyone connected with the Granat Brothers Company, either employed by the company or an attorney?

A. Well, this gentleman right here (indicating Mr. Hursh) called me up from Chicago last week and told me that he was going to be in town on the fourteenth and he wanted to know if I was going to be here.

Mr. Hursh: I previously sent you a wire, didn't I?

The Witness: Oh, yes; I had the wire, that is right. You sent me the wire about the 14th and I wired back that I was going to be here on the 14th.

Q. (By Mr. O'Hearn): When did you next see Mr. Hursh?

A. Well, this morning is the first time I saw him.

Q. Did you discuss your testimony this morning with Mr. Hursh?

A. I discussed things, yes. [29]

Q. Did he discuss with you the question of whether or not the word "Wed-Lok" was descriptive of the interlocking rings? A. No.

Q. Did you by any chance have the letter which you first received from the Granat Brothers Com-

Plaintiff's Exhibit Q3—(Continued)

(Deposition of Harry Gamler.)

pany notifying you of the fact that there was a suit?

A. I believe I have that. There was a letter sent, wasn't there? (to Mr. Hursh).

Mr. Hursh: There was a letter sent just recently requesting you to secure advertisements. That is the only one that I know that came from Granat Brothers.

A. That is the only one that came.

Q. That is the only letter you have had from Granat Brothers in connection with this suit?

A. That is right.

Q. You stated, I believe, on direct examination that you keep a copy of all the advertisements advertising the Wed-Lok ring which you have placed in the newspaper?

A. That is right. [30]

Q. And have you produced all of those advertisements here?

A. Yes, I have got most of them here.

Q. Are there any others besides the ones you have produced?

A. I will have to check again. That is all she gave me; that is all the secretary gave me. I don't think there is any more. There may be some more radio script.

Mr. O'Hearn: That is all.

Plaintiff's Exhibit Q 3—(Continued)

(Deposition of Harry Gambler.)

Redirect Examination

By Mr. Hursh:

Q. Does the word "Lok" describe a wedding ring to you, Mr. Gamler? A. No.

Q. Does the word "Lok" describe an engagement ring to you? A. No.

Q. Mr. Gamler, would you state whether or not the word "Lok" describes a wedding ring-engagement ring ensemble to you? [31]

A. The word "Lok" describes what?

Q. A wedding ring-engagement ring ensemble?

A. No.

Mr. Hursh: That is all.

Recross-Examination

By Mr. O'Hearn:

Q. I believe I understood you to say, Mr. Gamler, that the radio scripts mentioning the name "Wed-Lok" appeared approximately whenever a newspaper advertisement appeared mentioning the name "Wed-Lok"?

A. Not every time, but it may be sometime if you don't advertise in the newspaper, it may go into the radio and we skip it. You see, on the radio we are on practically every day. The newspaper runs maybe one, two or three times a week, so we cannot have it all at one time.

Q. Approximately how many times would you say that "Wed-Lok" is mentioned in your radio advertising, Mr. Gamler?

Plaintiff's Exhibit Q 3—(Continued)

(Deposition of Harry Gambler.)

A. Well, I would have to get it from my advertising [32] man; offhand I couldn't tell.

Q. Would you say once a week, once a month, once every two months?

A. I would have to get the scripts to know.

Q. These radio scripts which have been stipulated that may be attached will represent all the radio scripts mentioning the name "Wed-Lok" which you have been able to find in your files?

A. Yes.

Mr. Hursh: It is stipulated by and between counsel that advertisements appearing in the Theatre Magazine of the Erlanger Theatre, Buffalo, New York, may be introduced in evidence as Exhibit 10.

(Exhibit Number 10 reserved for advertisements in Theatre Magazine of the Erlanger Theatre, Buffalo, New York.)

* * *

(Signature of witness waived.) [33]

CERTIFICATE

State of New York,
County of Erie—ss.

I, Carmen S. DePaolo, a Notary Public in and for the County of Erie and State of New York, duly commissioned and qualified, Do Hereby Certify that the above-named, Harry Gamler, a witness on behalf

Plaintiff's Exhibit Q 3—(Continued)

of the Plaintiff, was by me first duly sworn to testify the truth, the whole truth and nothing but the truth, and that the deposition above set forth was taken at the time and place specified in the notice hereto annexed and pursuant to stipulation between counsel for the respective parties. That said deposition was taken by me stenographically and reduced to typewriting by me.

I Do Further Certify that the signature of the witness was waived.

I Do Further Certify that the plaintiff introduced and marked Plaintiff's Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10, which exhibits are submitted herewith.

I Do Further Certify that the reason for taking the aforesaid deposition is that said witness resides more than one hundred miles from the place of trial of this action.

I Do Further Certify that I am neither of Counsel, nor attorney, for either or any of the parties to said cause, and that I am not interested in the event of said suit.

In Witness Whereof, I have hereunto set my hand and seal this 17th day of February, 1949.

[Seal] /s/ CARMEN S. DePAOLO,
Notary Public in and for Erie County, New York.

My Commission Expires Mar. 30, 1949.

[Endorsed]: Filed Mar. 4, 1949.

PLAINTIFF'S EXHIBIT R-3

Deposition of Benjamin B. Shapiro, taken by the plaintiff, on Friday, February 18, 1949, commencing at 10:00 o'clock a.m., at 411 West Fifth Street, Los Angeles, California, pursuant to the annexed notice of taking deposition, before Mack M. Racklin, a Notary Public in and for the County of Los Angeles, State of California.

Appearances:

For the Plaintiff:

MELLIN & HANSCOM, by
JACK HURSH, ESQ.,
391 Sutter Street,
San Francisco 8, California.

For the Defendants:

NAYLOR & LASSAGNE, by
REGINALD E. CAUGHEY, ESQ.,
811 West Seventh Street,
Los Angeles, California. [2*]

Mr. Hursh: Do we have the usual stipulation, Mr. Caughey, respecting the exceptions to questions, that all objections will be reserved except as to the form of the question?

Mr. Caughey: Is that the stipulation that was entered into by Mr. Naylor?

Mr. Hursh: Yes. It is stipulated that a carbon copy of the notice of the taking of depositions may be attached to this deposition, the original having

* Page numbering appearing at top of page of original certified Transcript of Record.

Plaintiff's Exhibit R 3—(Continued)
(Deposition by Benjamin B. Shapiro.)

been attached to the depositions that were taken at Portland?

Mr. Caughey: That is satisfactory.

Mr. Hursh: Swear the witness.

BENJAMIN B. SHAPIRO

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Hursh:

Q. State your name, please.

A. Benjamin B. Shapiro.

Q. And your address?

A. 803 North Elm Drive, Beverly Hills.

Q. What is your occupation?

A. Jeweler. [3]

Q. How long have you been in the jewelry business? A. 37 years.

Q. Have you ever heard of a firm of manufacturing jewelers by the name of Granat Bros.?

A. Yes.

Q. How long have you known of Granat Bros.?

A. I have known them, personally, for about 24 years, but I have heard of the company for a number of years prior to that.

Q. Do you know of the type of product that is manufactured and sold by Granat Bros.?

A. A line of rings, wedding rings and mountings.

Plaintiff's Exhibit R 3—(Continued)

(Deposition by Benjamin B. Shapiro.)

Q. Are you familiar with the trademark "Wed-Lok"? A. Yes, sir.

Q. Do you know whose products are identified by the trademark "Wed-Lok"?

A. Granat Bros.

Q. What type of products does the trademark "Wed-Lok" identify?

A. It identifies a wedding ring and an engagement ring.

Q. How long have you known of the use of the trademark "Wed-Lok" to identify wedding rings and engagement rings?

A. I would say about ten years. [4]

Q. When you hear the word "Lok," it is spelled "l-o-k" or "l-o-c-k" used to identify a wedding ring or engagement ring ensemble, with whose product do you identify it?

A. I have always associated it with Granat Bros.

Q. Have you ever advertised the sale of "Wed-Lok" rings in your store?

A. Yes, very extensively.

Q. What type of advertising do you employ?

A. Newspaper and the circular type of advertising.

Q. Do you have the newspaper advertisements with you?

Plaintiff's Exhibit R 3—(Continued)

(Deposition by Benjamin B. Shapiro.)

A. Well, I have the scrap book showing the advertising.

Q. These scrap books, are they kept by your firm in the usual course of business?

A. Yes, they are. They contain all the advertising of the given periods.

Q. I notice on your advertising material that you have placed the paper in which the advertisement appears and the date on which it appears at the bottom of each ad. Is that your customary practice? A. Yes, sir.

Q. In each instance the advertisement was placed in the paper and run on the date that is noted on the ad? A. Yes, sir. [5]

Q. And the first advertisement that I find is one that appeared in the Examiner on May 25, 1947.

A. Correct.

Q. And that ad was placed in the paper by your firm on that date? A. Yes.

Mr. Hursh: I will introduce that as Exhibit No. 1, and is it stipulated we may take photostatic copies of the necessary advertisements and introduce them into evidence in lieu of the original?

Mr. Caughey: Yes.

Mr. Hursh: I will just mark it and put a circle around the numerals so we can identify them.

Mr. Caughey: All right.

Q. (By Mr. Hursh): That advertisement announced a "Wed-Lok" ring ensemble, does it?

Plaintiff's Exhibit R 3—(Continued)

(Deposition by Benjamin B. Shapiro.)

Mr. Caughey: That is objected to; the advertisement speaks for itself.

The Witness: Yes.

Q. (By Mr. Hursh): The next advertisement is one that—and it is noted that it appeared in the Herald on May 29, 1947, and in the Examiner on June 4, 1947. Did that advertisement appear on or in those two papers on the respective dates?

A. That same advertisement, yes.

Mr. Hursh: I will introduce that into evidence as [6] Exhibit No. 2.

Mr. Caughey: There is no objection, with the understanding that that portion of the ad which has no reference to any of the matters in issue may be disregarded.

Mr. Hursh: That is stipulated to, yes; in all of these advertisements where any other merchandise is advertised that will be disregarded. The only part of the advertisement we are interested in is that referring to the sale of "Wed-Lok" rings.

Mr. Caughey: All right.

Q. (By Mr. Hursh): You next have an ad that appeared in the Herald on June 5, 1947, and in the Examiner on June 8, 1947.

A. Yes.

Mr. Hursh: I will introduce that as Exhibit No. 3.

Q. That ad appeared in the respective papers and on the respective dates, is that right?

Plaintiff's Exhibit R 3—(Continued)
(Deposition by Benjamin B. Shapiro.)

A. Yes, sir.

Q. On the next page, in which a "Wed-Lok" advertisement appears, you have the advertisement of the Examiner on June 15, 1947, and of the Examiner on June 22, 1947, and both of those advertisements were placed in the paper on those respective dates? A. Yes.

Mr. Hursh: I will introduce both of those as Exhibit No. 4. [7]

Q. (By Mr. Hursh): I find another ad that appeared in the News on June 19, 1947. Was that advertisement run in the paper on that date by your firm? A. Yes, sir.

Mr. Hursh: I will introduce that advertisement as Exhibit No. 5.

Q. (By Mr. Hursh): The next advertisement appearing in the book is one that was run in the Examiner on June 27, 1947, and did that advertisement appear in the Examiner on that date?

A. Yes, sir.

Mr. Hursh: I will introduce that as Exhibit No. 6.

Q. (By Mr. Hursh): The next advertisement I find is one that appeared in the Herald on July 10, 1947. Did your firm place that advertisement in the Herald on that date? A. Yes, sir.

Mr. Hursh: I will introduce that into evidence as Exhibit No. 7.

Q. (By Mr. Hursh): On the next page I find

Plaintiff's Exhibit R 3—(Continued)
(Deposition by Benjamin B. Shapiro.)

an advertisement that appeared in the Examiner and in the Herald on July 19, 1947. Did that advertisement appear in the paper on that date?

A. Yes.

Mr. Hursh: I will introduce that as Exhibit No. 8.

Q. (By Mr. Hursh): I find an advertisement in the [8] Herald on the date of July 17, 1947, and an advertisement that was in the Examiner on July 20, 1947. Were those advertisements placed in the respective papers on those dates? A. Yes.

Mr. Hursh: I will introduce the entire page on which the two advertisements appear as Exhibit No. 9.

Q. (By Mr. Hursh): The next advertisement is one that appeared in the Herald on July 24, 1947, and in the Examiner on July 28, 1947. Well, strike that question.

The next advertisement is one that appeared in the Herald on July 31, 1947, and in the Examiner on August 3, 1947. Also, the advertisements that appeared in the Herald on August 7th, 1947, and in the Examiner on August 10, 1947. Were those advertisements placed in the respective papers and on the respective dates as shown on the exhibit?

A. Yes, sir.

Mr. Hursh: I will introduce that as Exhibit No. 10. Exhibit 10 will include both of the advertisements, all of the advertisements, appearing on that page.

Plaintiff's Exhibit R 3—(Continued)

(Deposition by Benjamin B. Shapiro.)

Q. (By Mr. Hursh): The next advertisement is one that appeared in the Herald on August 14, 1947, and in the Examiner on August 17, 1947. Was that advertisement placed in those respective papers on the dates mentioned? A. Yes, sir. [9]

Mr. Hursh: I will introduce that as Exhibit No. 11.

Q. (By Mr. Hursh): I find an advertisement that appears in the Times on August 31, 1947, and in the Herald on September 4, 1947. Was that advertisement placed in those papers on those dates?

A. Yes, sir.

Mr. Hursh: I will introduce that as Exhibit No. 12.

Q. (By Mr. Hursh): I find an advertisement that appeared in the Examiner on September 6, 1947. Did your firm place that advertisement in the paper on that date? A. Yes, sir.

Mr. Hursh: I will introduce that as Exhibit No. 13.

Q. (By Mr. Hursh): I next find an advertisement that appeared in the News on September 11, 1947. Did your firm place an advertisement in the paper on that date? A. Yes, sir.

Mr. Hursh: I will introduce that as Exhibit No. 14.

Q. (By Mr. Hursh): I find an advertisement that appeared in the Herald on September 25, 1947,

Plaintiff's Exhibit R 3—(Continued)
(Deposition by Benjamin B. Shapiro.)

and in the Examiner on September 28, 1947. Was that advertisement placed in those respective papers on the dates mentioned by your firm? A. Yes.

Mr. Hursh: I will introduce that as Exhibit No. 15.

Q. (By Mr. Hursh): I next find an advertisement in the Examiner on October 12, 1947, advertising "Wed-Lok." [10] Was that advertisement placed in the paper on that date by your firm?

A. Yes, sir.

Mr. Hursh: I will introduce that as Exhibit No. 16.

Q. (By Mr. Hursh): The next advertisement is one appearing in the Herald on November 22, 1947. Was that advertisement placed in that paper on that date? A. Yes, sir.

Mr Hursh: I will introduce that as Exhibit No. 17.

Q. (By Mr. Hursh): I find the next advertisement one that appears in the Times on November 30, 1947, and in the News on December 3, 1947. Was that advertisement placed in those papers on the respective dates mentioned? A. Yes, sir.

Mr. Hursh: I will introduce that as Exhibit No. 18.

Q. (By Mr. Hursh): The next advertisement is where you advertise the sale of "Wed-Lok" ring ensembles, appearing in the Examiner on December 14, 1947, and in the Herald on December 18, 1947.

Plaintiff's Exhibit R 3—(Continued)

(Deposition by Benjamin B. Shapiro.)

Was that advertisement placed in the papers by your firm on those dates? A. Yes, sir.

Mr. Hursh: I will introduce that as Exhibit No. 19.

Q. (By Mr. Hursh): The next one is one that appeared in the Examiner on December 21, 1947. Was that advertisement placed in the paper by your firm? A. Yes, sir. [11]

Mr. Hursh: I will introduce that as Exhibit No. 20.

Q. (By Mr. Hursh): The next advertisement appearing in the Times on December 19, 1947, and that was placed in the paper by your firm, was it?

A. Yes.

Mr. Hursh: We will introduce that as Exhibit No. 21.

Q. (By Mr. Hursh): The next advertisement is one that appeared in the Examiner on December 28, 1947. Did your firm place that in the paper on that date? A. Yes, sir.

Mr. Hursh: We will introduce that as Exhibit No. 22.

Q. (By Mr. Hursh): The next advertisement is one that was in the Herald on January 15, 1948, and did your firm place that advertisement in the paper on that date? A. Yes, sir.

Mr. Hursh: We will introduce that as Exhibit No. 23 into evidence.

Q. (By Mr. Hursh): I find an advertisement

Plaintiff's Exhibit R 3—(Continued)
(Deposition by Benjamin B. Shapiro.)

that appeared in the Sunday Examiner on January 17, 1948. Did your firm place that advertisement in the paper on that date? A. Yes.

Mr. Hursh: We will introduce that as Exhibit No. 24. Evidently, one of these dates is Sunday, January 18th, on Exhibit 24 instead of the 17th.

Q. (By Mr. Hursh): I find next an advertisement that [12] appeared in the Examiner on February 8, 1948. Was that advertisement placed in the paper by your firm? A. Yes.

Mr. Hursh: I would like to introduce that into evidence as Exhibit No. 25.

Q. (By Mr. Hursh): The next advertisement is one that appeared in the Examiner on February 29, 1948, and that was placed in the paper by your firm? A. Yes, sir.

Mr. Hursh: I will introduce that as Exhibit No. 26.

Q. (By Mr. Hursh): On the same page I find one that appeared in the Times under date of February 29, 1948. That also was placed in the paper by your firm? A. Yes.

Q. Both of those advertisements appearing on this particular page will be included in No. 26.

Now, I find an advertisement that appeared in the Times on March 22, 1948, and that advertisement was placed in the Times on March 22, 1948, was it, by your firm? A. Yes, sir.

Plaintiff's Exhibit R 3—(Continued)

(Deposition by Benjamin B. Shapiro.)

Mr. Hursh: We will introduce that as Exhibit No. 27.

Mr. Caughey: What is that?

Mr. Hursh: That was on March 22, 1948. That was Exhibit No. 27.

Q. (By Mr. Hursh): The next advertisement is one dated March 29, 1948, in the Times, and that was placed [13] in the paper by your firm?

A. Yes.

Mr. Hursh: We will introduce that as Exhibit No. 28.

Q. (By Mr. Hursh): I find one that appeared in the Examiner on April 4, 1948, and that was placed in the paper by your firm? A. Yes.

Mr. Hursh: I will introduce that as Exhibit No. 29.

Q. (By Mr. Hursh): And in the Herald on April 8, 1948, the "Wed-Lok" ad appeared in the paper. Was that placed in the paper by your firm?

A. Yes.

Mr. Hursh: That will be Exhibit No. 30 that we will introduce into evidence.

Q. (By Mr. Hursh): And an advertisement in the Times under date of April 11, 1948. Did your firm place that advertisement in the paper?

A. Yes, sir.

Mr. Hursh: That will be Exhibit No. 31.

Q. (By Mr. Hursh): I find an advertisement that appeared in the Examiner on March 21, 1948,

Plaintiff's Exhibit R 3—(Continued)
(Deposition by Benjamin B. Shapiro.)

advertising the "Wed-Lok" ring ensembles. Was that placed in the paper by your firm?

A. Yes.

Mr. Hursh: That will be Exhibit No. 32.

Mr. Caughey: The Examiner, was it? [14]

Mr. Hursh: Yes.

Q. (By Mr. Hursh): I next find an advertisement that appeared in the Examiner on April 10, 1948, and one in the Examiner on April 19, 1948, and did your firm place those advertisements in the paper?

A. Yes. Is that page out of place?

Q. Well, it is just out of place, and to keep it in sequence, we will keep it where it is in the book.

I will introduce that as Exhibit No. 33.

I find an advertisement that appeared in the Examiner on April 25, 1948, and that was placed in the paper by your firm? A. Yes.

Mr. Hursh: I will introduce that into evidence as Exhibit No. 34.

Q. (By Mr. Hursh): I find an advertisement in the Times dated May 2, 1948, advertising the "Wed-Lok" ensembles. Did that advertisement appear in the paper on that date? A. Yes.

Mr. Hursh: We will introduce that as Exhibit No. 35.

Q. (By Mr. Hursh): I next find an advertisement in the Examiner under date of May 23, 1948. Was that placed in the paper by your firm?

Plaintiff's Exhibit R 3—(Continued)
(Deposition by Benjamin B. Shapiro.)

A. Yes.

Mr. Hursh: That will be introduced as Exhibit No. 36. [15]

Q. (By Mr. Hursh): Also one in the Examiner under date of May 31, 1948. Was that placed in the paper by your firm? A. Yes.

Mr. Hursh: That will be Exhibit No. 37.

Q. (By Mr. Hursh): I find an advertisement that appeared in the Times on June 22, 1948, and that was placed in the paper by your firm, was it?

A. Yes.

Mr. Caughey: That was in the Times?

Mr. Hursh: Yes. That will be Exhibit No. 38 into evidence.

Q. (By Mr. Hursh): The next advertisement is one that appeared in the Examiner on June 27, 1948. Did your firm place that in the paper on that date?

A. Yes, sir.

Mr. Hursh: That will be Exhibit No. 39.

Q. (By Mr. Hursh): The next advertisement is one that appeared in the Times on July 19, 1948, and did your firm place that advertisement in the paper? A. Yes, sir.

Mr. Hursh: I would like to introduce that into evidence as Exhibit No. 40.

Q. (By Mr. Hursh): I find an advertisement that appeared in the Examiner on July 25, 1948. Did your firm place that advertisement in the paper? [16] A. Yes, sir.

Plaintiff's Exhibit R 3—(Continued)

(Deposition of Benjamin B. Shapiro.)

Mr. Hursh: That will be Exhibit No. 41 into evidence.

Mr. Caughey: That was in the Examiner, was it?

Mr. Hursh: Yes, the Examiner.

Q. (By Mr. Hursh): The next advertisement is one that appeared in the Times on July 30, 1948. Did your firm place that advertisement in the paper? A. Yes.

Mr. Hursh: That will be Exhibit No. 42.

Q. (By Mr. Hursh): The next advertisement is one in the Examiner on August 13, 1948, and did your firm place that one in the paper on that date?

A. Yes, sir.

Mr. Hursh: We will introduce that as Exhibit No. 43.

Q. (By Mr. Hursh): I find an advertisement in the Times of August 20, 1948. Was that advertisement placed in the paper by your firm on that date? A. Yes, sir.

Mr. Hursh: That will be Exhibit No. 44.

Q. (By Mr. Hursh): I find an advertisement in the Examiner on September 5, 1948, advertising the "Wed-Lok" ensemble. Was that advertisement placed in the paper by your firm?

A. Yes, sir.

Mr. Hursh: That will be Exhibit No. 45.

Q. (By Mr. Hursh): I find an advertisement that [17] appeared in the Times on September 12,

Plaintiff's Exhibit R 3—(Continued)
(Deposition of Benjamin B. Shapiro.)

1948, advertising the "Wed-Lok" rings. Was that advertisement placed in the paper by your firm?

A. Yes.

Mr. Hursh: We will introduce that as Exhibit No. 46.

Q. (By Mr. Hursh): On the following page is an advertisement that appeared in the Herald on September 16, 1948. Was that ad placed in the paper by your firm? A. Yes, sir.

Mr. Hursh: We will introduce that as Exhibit No. 47.

Q. (By Mr. Hursh): I find an advertisement in the Examiner on September 23, 1948, advertising the "Wed-Lok" sets. Was that placed in the paper by your firm? A. Yes, sir, it was.

Mr. Hursh: That will be Exhibit No. 48.

Q. (By Mr. Hursh): Also, an advertisement in the Times under date of September 28, 1948. Was that placed in the paper by your firm?

A. Yes.

Mr. Hursh: That will be Exhibit No. 49.

Q. (By Mr. Hursh): An advertisement that appeared in the Times on October 10, 1948, and was that placed in the paper by your firm?

A. Yes, sir.

Mr. Hursh: That will be Exhibit No. 50.

That completes the second book. [18]

Q. (By Mr. Hursh): I find an advertisement in the Herald dated October 21, 1948, advertising

Plaintiff's Exhibit R 3—(Continued)
(Deposition of Benjamin B. Shapiro.)

the "Wed-Lok." Was that advertisement placed in the paper by your firm? A. Yes.

Mr. Hursh: That will be Exhibit No. 51.

Q. (By Mr. Hursh): On the same page as one that appeared in the Examiner on October 22, 1948. Was that placed in the paper by your firm?

A. Yes.

Mr. Hursh: That will be included in Exhibit 51.

Q. (By Mr. Hursh): The next advertisement is one in the Times on October 31, 1948. Was that placed in the paper by your firm? A. Yes, sir.

Mr. Hursh: That will be Exhibit No. 52.

Q. (By Mr. Hursh): I find an advertisement in the Examiner on December 3, 1948, advertising the "Wed-Lok" ensemble. Was that placed in the paper by your firm? A. Yes.

Mr. Hursh: That will be Exhibit No. 53.

Q. (By Mr. Hursh): I find an advertisement in the Examiner dated December 12, 1948. Was that placed in the paper by your firm? A. Yes.

Mr. Hursh: That will be introduced as Exhibit No. 54. [19]

I believe that is all of those.

Q. (By Mr. Hursh): I also find in your compilation of the advertisements a notation that an advertisement appeared on January 2, 1949, in the Times. Do you know whether or not an advertisement was placed in the paper on that date?

A. Yes.

Plaintiff's Exhibit R3—(Continued)

(Deposition of Benjamin B. Shapiro.)

Mr. Hursh: Is it stipulated we may have a photostatic copy of that advertisement introduced into evidence as the exhibit next in number?

Mr. Caughey: Yes, no objection. What date was that?

Mr. Hursh: January 2, 1949. That will be introduced into evidence as Exhibit No. 55.

Mr. Caughey: In what paper?

Mr. Hursh: The Times.

Q. (By Mr. Hursh): Mr. Shapiro, you have also handed me a schedule of "Wed-Lok" ads showing the dates and the size of the advertisement, the particular paper in which the advertisement appeared, and the amount that the ad cost your firm.

A. Yes.

Q. Was this compilation made under your direction? A. Yes.

Mr. Hursh: I will introduce that compilation.

Mr. Caughey: May I see it first? [20]

Mr. Hursh: Sure.

Mr. Caughey: All right.

Mr. Hursh: I will introduce that into evidence as Exhibit No. 56, subject to correction, if any error is found.

Mr. Caughey: I want to do this. I would like to reserve any objection I have until I have had an opportunity of cross-examining the witness as to that particular exhibit.

Mr. Hursh: All right.

Plaintiff's Exhibit R3—(Continued)

(Deposition of Benjamin B. Shapiro.)

Q. (By Mr. Hursh): You have also produced some circulars. Can you identify the first circular that you produced? A. Yes, sir.

Q. When was that circular put out by your firm?

A. That was Christmas of 1947.

Q. I find on Pages 12 and 13 reference to the sale of "Wed-Lok" ring ensembles by your firm.

A. Yes, sir.

Q. How was this circular distributed?

A. By mail; they were mailed out.

Mr. Hursh: Do you want to see this?

Mr. Caughey: Yes. All right.

Mr. Hursh: I will introduce Pages 12 and 13 into evidence as Exhibit No. 57.

Q. (By Mr. Hursh): Also, a second circular that was [21] sent out by your firm; can you identify that? A. Yes, sir.

Q. Will you tell us what that circular is?

A. Well, there were 50,000 of these printed, and that went out in the spring of 1948. By the way, there were 100,000 printed of the last one. If you want that information, I have it for you.

Q. You are referring now to Exhibit No. 57?

A. The Christmas catalogue, yes.

Q. And how many copies of this were sent out by your firm? A. 100,000.

Q. In this catalogue that was sent out in the spring of 1948, do you mention the "Wed-Lok" rings? A. Yes, sir.

Plaintiff's Exhibit R3—(Continued)

(Deposition of Benjamin B. Shapiro.)

Q. And that appears on the back page of that circular? A. Yes.

Mr. Hursh: I will introduce this circular as Exhibit No. 58.

Q. (By Mr. Hursh): Can you state how many of those were sent out? A. 50,000.

Q. You have also produced a third circular. Can you identify that?

A. That was the Christmas circular of 1948, and 100,000 of those were mailed out. [22]

Q. Do you mention the sale of the "Wed-Lok" rings in this circular? A. Yes, sir.

Mr. Hursh: I will introduce this page into evidence as Exhibit No. 59.

Q. (By Mr. Hursh): How many copies of Exhibit No. 59 did your firm send out?

A. 100,000.

Q. Have you ever heard of a ring ensemble sold under the name of "Feature Lock"? A. Yes.

Q. When you first heard of the trade-mark "Feature Lock," used in connection with a ring ensemble, with whose product did you identify it?

A. With the Granat product.

Q. What was your first impression when you first heard of the trade-mark "Feature Lock" as applied to ring ensembles?

A. Well, I felt that any ring that would be named "lock" was a Granat product.

Q. Will you state whether or not you identified

Plaintiff's Exhibit R3—(Continued)
(Deposition of Benjamin B. Shapiro.)

the trade-mark "Feature Lock" with a Granat product the first time you heard of it?

A. I thought it was, yes. They have used the trade name "lock" on rings for a good many years and I automatically took it that any ring with that name would be a [23] Granat product.

Q. Will you state whether or not the first time you heard the trade-mark "Feature Lock" used in conjunction with a ring ensemble that you were confused as to actually whose product that trade-mark was applied to?

A. Later there was some confusion but at first I thought it was a Granat product, but we later understood that it wasn't.

Q. Do you sell "Wed-Lok" rings in your store in Los Angeles? A. Yes, sir.

Q. And do you consider the word "lok" as used by you in the sale of "Wed-Lok" ring ensembles to be an important part of the trade-mark "Wed-Lok"?

Mr. Caughey: That is objected to as calling for the conclusion of the witness, and I will also object to the form of the question. It is a leading question, obviously a leading question, and on the further ground that there is no foundation laid that this witness is qualified to answer such a question.

Mr. Hursh: He has already answered it.

The Witness: Yes.

Plaintiff's Exhibit R3—(Continued)

(Deposition of Benjamin B. Shapiro.)

Q. (By Mr. Hursh): Will you state whether or not the use of the trade-mark "Wed-Lok" in the sale of ring ensembles by your store, that you considered the word "lok" to be a dominant part of the trade name "Wed-Lok"? [24]

Mr. Caughey: The same objection.

The Witness: Yes, indeed.

Q. (By Mr. Hursh): Have you ever had customers enter your store and ask for wedding ring ensembles, wedding rings and engagement ensembles under the trade name "Wed-Lok"?

A. We certainly have.

Q. And how often does this occur?

A. Well, with the amount of advertising that we put out, why, it occurs continuously or we wouldn't spend the money we have. We have spent tens of thousands of dollars to bring customers in on that "Wed-Lok" feature.

Q. Have you ever had customers enter your store and ask for wedding ring and engagement ring ensembles by calling for the "lok" ensemble?

A. Yes.

Q. What type of quality of product does Granat Bros. manufacture itself?

Mr. Caughey: That is objected to as calling for the conclusion of the witness.

Mr. Hursh: This witness has been in the jewelry business for 25 or 30 years and is fully conversant with jewelry products and over this period of time

Plaintiff's Exhibit R 3—(Continued)

(Deposition of Benjamin B. Shapiro.)

he has undoubtedly familiarized himself with the various qualities of jewelry on the market and is fully capable of determining the quality of the product sold by a manufacturer. Will [25] you answer the question?

The Witness: One of the very best manufactured lines of jewelry in the country.

Q. (By Mr. Hursh): Can you tell us the reputation that Granat Bros. products enjoy in the Los Angeles area?

Mr. Caughey: That is objected to as calling for the conclusion of the witness; what this witness might think is no proof of what the reputation actually is.

The Witness: The very best.

Q. (By Mr. Hursh): Do you know the value of the "Wed-Lok" ring ensembles that have been purchased by your company over the past two years?

A. A trifle under $80,000.

Q. And have you the order forms that have been employed by your concern in ordering "Wed-Lok" rings from Granat Bros.?

A. Yes, we have the exact orders and the dates.

Q. When was the first time that you purchased "Wed-Lok" rings from Granat Bros.?

Mr. Caughey: That is objected to as asking a question which is not borne out by the evidence. There is nothing in the evidence shown that he has

Plaintiff's Exhibit R 3—(Continued)
(Deposition of Benjamin B. Shapiro.)

purchased any rings from Granat Bros. and those particular documents——

Mr. Hursh: Well, I will withdraw the question and ask you:

Q. When is the first time you purchased "Wed-Lok" [26] ring ensembles?

A. I would say ten years ago.

Q. What type of ring ensemble was that?

A. It was a ring that was worn together and stayed put; it didn't turn around on the finger.

Q. What means were used to keep the settings in alignment, if you know?

A. Well, it was a sort of grooved principle. It wasn't, of course, the final development which was the very latest "Wed-Lok" which was the snap feature. However, I was told by the Granat Bros.——

Mr. Caughey: That is objected to as calling for hearsay testimony, if he is going into this kind of testimony. Now, I think he should be instructed to state only facts and not hearsay if he is going into testimony of that kind.

The Witness: Granat Bros. told me that they were developing something sensational and something that was extraordinary in the ring combination, somewheres in the fall of '35, and in 1935 was when they told me they were developing something that would revolutionize the entire industry. That was a refinement of their "Wed-Lok" ring that they have been making for many years.

Plaintiff's Exhibit R 3—(Continued)
(Deposition of Benjamin B. Shapiro.)

Q. (By Mr. Hursh): When was the first time——

Mr. Caughey: A motion is made to strike that portion of the testimony referring to conversation with Granat [27] Bros.

Q. (By Mr. Hursh): When was the first time you purchased "Wed-Lok" rings of this new type, that of the little snap lock or click feature?

A. That was back in May of 1947.

Q. And have you the records of your firm showing your purchase of the "Wed-Lok" ring ensemble from May, 1947?

A. Yes, I have them right here, the exact dates and the amount of the purchase and the different styles.

Q. That runs from May 14, 1947, to November 10, 1948, does it? A. Yes, sir.

Q. These are the order blanks of your firm with respect to the "Wed-Lok" ring sets? A. Yes.

Mr. Hursh: I will introduce the entire set of orders as Exhibit No. 60 into evidence. It is stipulated that photostatic copies of these records may be made and substituted for the originals?

Mr. Caughey: That is right.

Mr. Hursh: There are 12 sheets included in Exhibit No. 60.

Q. (By Mr. Hursh): Have you made a compilation of the exact amount of merchandise purchased as represented by Exhibit No. 60? [28]

Plaintiff's Exhibit R 3—(Continued)

(Deposition of Benjamin B. Shapiro.)

A. I have it here; $77,396.

Q. Referring to Exhibit No. 60, you have noted on the first page the order dated "5-14-47" that there may be some possible discrepancy with respect to whether or not certain amounts, certain of the items were "Wed-Lok" rings. Will you explain the situation with respect to that particular page of the order blanks?

A. The possibility is that the orders on this page are also "Wed-Loks" but in writing the order down they overlooked mentioning "Wed-Lok" so that would mean that out of $77,396 worth of purchases, there is roughly about $279 worth that maybe would not be "Wed-Lok," but I am not sure.

Mr. Hursh: I believe that is all of the direct examination of the witness. You may cross-examine.

Cross-Examination

By Mr. Caughey:

Q. I note in your testimony, Mr. Shapiro, that you have used the word "ensemble" in connection with the "Wed-Lok" rings. A. Yes.

Q. Do you also use the word "ensemble" in connection with the sale of other rings other than "Wed-Lok" rings?

A. Well, any combination of two rings could be [29] termed "ensemble."

Q. And you have so advertised them, is that right, other than "Wed-Lok" rings?

Plaintiff's Exhibit R 3—(Continued)
(Deposition of Benjamin B. Shapiro.)

A. I would say that any combination of rings would be an ensemble.

Q. My next question is: In advertising other rings other than "Wed-Lok" rings, do you also refer to them as "ensembles" where you have a wedding and engagement ring together?

A. Not always.

Q. Sometimes you do? A. Sometimes, yes.

Q. You do not always advertise "Wed-Lok" rings as ensembles, do you?

A. Always, that is the only way we can.

Q. And you always use the word "ensemble" in your advertising? A. In "Wed-Lok," we do.

Q. You are sure of that? A. Yes.

Q. Now, the rings that you sell and call "Wed-Lok" rings, are they locked together?

A. They can be locked together and I think as a rule they are.

Q. When you sell them, you point out that that is a feature of them that they can be locked together, is that [30] correct?

A. Yes, sir, that is right.

Q. When you advertise the ring, do you always point out that feature?

A. When we advertise a "Wed-Lok," it is generally understood, that it is locking, that it has a locking feature of the two rings. It couldn't very well be one ring because if it were, it wouldn't have anything to lock to.

Plaintiff's Exhibit R 3—(Continued)

(Deposition of Benjamin B. Shapiro.)

Q. I call your attention to Exhibit No. 36, Mr. Shapiro, in the advertisement; the words "locked together," are in different type than some of the other wording of the ad. Isn't that so?

A. That could be a typographical——

Q. I am asking you if that isn't so, if that isn't the fact in that ad?

A. No, I don't think so.

Q. You wouldn't say that the words "locked together" are in a different kind of type than the words immediately preceding and after, in Line 2 of the comments in that ad?

A. I say that it is exactly the same type. The only difference is that one is a capital letter and——

Q. Then you testify that the typing, or, rather, the type of the word "that" which immediately precedes the words "locked together," that they are the same, [31] that that word "that" is the same; is that your testimony?

A. The type is exactly the same; absolutely.

Q. I am not talking about the size of the type.

A. The type is exactly the same.

Mr. Hursh: If you don't understand the question, if it isn't understandable to you, make sure that you understand the question before you answer it.

Q. (By Mr. Caughey): I will ask if the appearance of the type, Mr. Shapiro, the words I have referred to "locked together," do they appear the

Plaintiff's Exhibit R 3—(Continued)
(Deposition of Benjamin B. Shapiro.)

same and look the same as the words that immediately precede it?

A. Well, as I understand the question, I would say that they are the same.

Q. All right, that is all, as far as that question is concerned.

Now, you also sell in your store engagement rings and wedding rings. You sell them together as an ensemble? A. Sometimes, yes.

Q. Sometimes? A. Yes.

Q. Now, when you sell "Wed-Lok" rings, do you distinguish that ensemble of "Wed-Lok" rings from the ensemble of engagement rings and wedding rings by the fact that they do lock together or can be locked together?

A. We don't have to. The customer does that for us; they come in and demand and want the locking ring. [32]

Q. In other words, they ask many times for a locking ring?

A. Yes, they ask for a "Wed-Lok."

Q. My question is: Do they ask for a locking ring?

A. They ask for a ring that locks together, very often.

Q. Do they once in a while come in and ask for a "lok" ring? A. Once in a while.

Q. When they ask for a "lok" ring, you show

Plaintiff's Exhibit R 3—(Continued)
(Deposition of Benjamin B. Shapiro.)

them a ring that can be locked together, is that correct?

A. Well, when they are questioned, they are asked, and if you refresh them, they want a "Wed-Lok," the thing they have seen us or seen advertised in other cities throughout the east and in national magazines.

Q. Just wait a second, please, Mr. Shapiro. If you will just answer my question and not go on, we will get along better together. Whether these people saw them in the east is something that they would have to tell you and that is merely hearsay testimony, so it does not belong in this record.

Now, Mr. Shapiro, LeRoy's is what, a partnership?

A. Yes, a partnership.

Q. You started handling this present type of "Wed-Lok" ring in May of 1947?

A. Well, we have handled "Wed-Lok"—— [33]

Q. I am talking about the one shown by these advertisements. I said "the present type."

A. When Granat developed the new type, we started handling them.

Q. That was in May of 1947?

A. I would say about that time.

Q. Prior to May of '47, when did you previously make a purchase of a ring that you sold under the word "Wed-Lok"?

Plaintiff's Exhibit R 3—(Continued)

(Deposition of Benjamin B. Shapiro.)

A. Those records we have on file. I could get the information.

Q. As a matter of fact, it was a number of years, was it? A. No.

Q. Are you sure about that?

A. As far as I recall, we had the Granat "Wed-Lok" continuously for approximately ten years in different types that they made and different developments; they have continuously refined and developed and worked out the idea.

Q. So it is your testimony that for the last ten years that you have had "Wed-Lok" rings in your store and sold them over your counter, which you secured from Granat's, is that right?

A. During that period, yes, I would say at different times.

Q. I am talking about the last ten years, continuously for the last ten years. [34]

A. Well, there was a period during the war that we wanted them but we couldn't get them. Granat couldn't produce them.

Q. Did you have them continuously for the last ten years?

A. We had them as long as they were available, as long as they were able to supply them; we had orders on file.

Q. You have brought no records to show any previous purchases prior to May of 1947?

A. We easily could have if we knew that was

Plaintiff's Exhibit R 3—(Continued)
(Deposition of Benjamin B. Shapiro.)

what you wanted. We could have gotten the records.

Q. As a matter of fact, Granat didn't manufacture and sell any rings called "Wed-Lok" rings for a number of years during the war, did they?

A. On the contrary; they have continuously and uninterruptedly outside of the periods that they couldn't get the material that the government impounded, or couldn't do it for manpower reasons, but they have the material and the manpower and they were continually making and selling——

Q. You have no records showing that prior to May of 1947 and between that and the year 1940, when you purchased "Wed-Lok" rings from Granat Bros. or any other concern; you haven't brought any records here? A. I think we could. [35]

Q. I am not asking you if you have any records available——

A. If you would have asked for them here.

Q. I am not calling you as a witness, Mr. Shapiro.

Now, I believe you testified that you considered the word "lok" an important part of the word, of the complete word "Wed-Lok".

A. Indeed, I do. That is the most important.

Q. Then if the defendants in this case were using the word "Feature Ring," you wouldn't think there would be any possibility of confusion with "Wed-Lok." Is that correct?

A. All I would say is this: That as far as any

Plaintiff's Exhibit R3—(Continued)
(Deposition of Benjamin B. Shapiro.)

ring called "lok" and if it has any similarity to the Granat "lok," that would be something for you lawyers to determine what the infringements, if any, are.

Q. You had no difficulty on direct examination stating that you were confused between the words "Feature Lock" and "Wed-Lok." You so testified, did you not?

A. I, as a jeweler, as an expert, could tell.

Q. But I am asking you as a jeweler and as an expert, would you be confused between the words "Feature Ring" and "Wed-Lok," between those two?

A. I don't get the question. Will you restate that, please?

Q. I am asking you if "Feature Lock" did not use [36] the word "lock" and substituted therefor the word "ring" and so they sold their rings under the name of "Feature Ring," whether or not in your opinion you would think that would be confusingly similar with "Wed-Lok"?

A. I would say that would be a subterfuge.

Q. I am not asking you that, Mr. Shapiro. I am asking you whether you would be confused, as a person who is skilled in this art, between those two words? A. Yes, to be frank, I would be.

Q. And why?

A. Because of the substitution and the faces there, that they would have to be examined very closely.

Plaintiff's Exhibit R3—(Continued)

(Deposition of Benjamin B. Shapiro.)

Q. What faces are you talking about would have to be examined closely?

A. If anyone were infringing upon any established patent and made the article as close to the original, it would fool anyone. I could be fooled.

Q. Then, in other words, you are giving your opinion as to confusion, you are taking into consideration the fact that Granat Bros. have a patent upon their ring which they called "Wed-Lok." Is that correct?

A. State that question again.

Mr. Caughey: Read it, please.

(Question read.)

The Witness: "Wed-Lok" ring and the "Wed-Lok" principle is the thing that we have invested a tremendous [37] amount of money and sell to the public as it was originally created by the manufacturer of that product and any substitutions by any name are confusing and misleading, both to the dealer as well as the purchaser.

Q. (By Mr. Caughey): As I understand your testimony, then, if the "Feature Lock" instead of selling their rings under the words "Feature Lock" were selling them under the words "Quick Lock," your answer as to confusion would be the same. Is that correct?

A. By the same token, if anyone——

Q. Just answer my question. Give me an answer yes or no. Can't you do that?

Plaintiff's Exhibit R3—(Continued)

(Deposition of Benjamin B. Shapiro.)

A. It is one of those, I guess, you couldn't very well give a yes or no answer to.

Q. Why not?

A. Because it is not one of those questions.

Mr. Caughey: Read the question.

(Question read.)

The Witness: There would be confusion, no doubt.

Q. (By Mr. Caughey): That confusion would be because the word "lock" was used as a part of the word under which the selling was being made?

A. It would be a combination of both; the name as well as the principle, if it was like the original.

Q. Then, as I understand your testimony—and if I am wrong, please tell me—you feel that being as Granat [38] Bros. were the first ones to bring out, as far as you know, a ring which locked together by some means, that they should have a superior place in the trade because they at first brought it out. Is that correct?

A. I am only concerned, if you want me to answer this question, with one thing. I have a tremendous investment in merchandise that I bought and was assured that it was patented and would not be infringed upon, and as evidenced by the amount of money that we have spent in advertising and the purchases that we have made, I feel that Granat Bros. should protect me as a dealer against infringements of merchandise sold with a similar name or

Plaintiff's Exhibit R3—(Continued)
(Deposition of Benjamin B. Shapiro.)

merchandise that is infringing upon the patent, which, of course, again I say that is something that if there is an infringement, has to be fought out and worked out with the principals. I am only buying the goods to resell to the customers.

Q. Now, you have the exclusive, as far as "Wed-Lok" is concerned, the "Wed-Lok" rings are concerned, do you not, in at least downtown Los Angeles?

A. Not to my knowledge, no, we don't; there are others that handle the ring.

Q. You have used the word "exclusive" in a number of these ads that have been placed into evidence. When you used that word "exclusive," in what sense did you use it? [39]

A. Maybe right in our block or in our street but not necessarily in the city. We have never said in any ad that we have an exclusive in Los Angeles.

Q. What do you mean when you say, when you use the word "exclusive" in your ads?

A. Just that it is exclusive in our particular area.

Q. Then what is that area?

A. It might be the street and, as far as I know, it is the street. There are many more jewelry stores on Broadway and, to the best of my knowledge, we are the only ones. In fact, I am sure we are the only ones that handle it on Broadway.

Q. Let's take Spring Street, downtown Spring

Plaintiff's Exhibit R3—(Continued)

(Deposition of Benjamin B. Shapiro.)

Street. Are there any jewelers on downtown Spring Street that handle it other than yourself?

A. I don't know.

Q. You don't know any that do, do you?

A. I never investigated and it really never made much difference.

Q. How about Hill Street?

A. I don't know.

Q. As a matter of fact, do you know any downtown jewelers that handle "Wed-Lok" rings other than yourself?

A. There are jewelers that handle them.

Q. I am asking about downtown jewelers. [40]

A. Yes, there are. I could get that information, if I was ever concerned, I could get it from the company, but it never concerned me.

Q. So when you use the word "exclusive" in your ads, you were just referring to a limited area on Spring Street, is that right, where you had the exclusive right to sell the rings?

A. Well, not on Spring Street.

Q. On Broadway? A. Yes, on Broadway.

Q. Are these advertisements that appear in these, or that are in evidence, are those advertisements advertisments that were made up by your advertising manager or some concern that handles your advertising?

A. Yes. You have asked about our using the term "exclusive." That wasn't used until very re-

Plaintiff's Exhibit R3—(Continued)
(Deposition of Benjamin B. Shapiro.)

cently, due to the very fact of considerable confusion in the minds of the customers in regard to other rings called by the name of "lok," and that is where we were forced to, in order to protect our investment in our advertising and in our merchandise, that we had the "Wed-Lok" exclusively for our area.

Q. I will call your attention to Exhibit No. 51, which is dated October 21, 1948, and that says "exclusive with LeRoy's."

A. That was the first time it was used. [41]

Q. "Wed-Lok, the rings that lock together."

A. That was the first time, because there was so much fraudulent advertising going on, in using the term "lok" in different forms, that we had to apprise the public and we did that, as I say, I think, for the first time that we had the "Wed-Lok exclusive" in our area.

Q. Now, you used the word "fraudulent," Mr. Shapiro. That is quite a harsh term to use, you will appreciate that. I don't like to have it in the record without some explanation of what you mean by that word. Are you meaning to imply that some concerns advertised "Wed-Lok" rings here and sold them as "Wed-Lok" rings when they didn't have any right to do so?

A. I am sorry to say I have to admit that is the truth. In fact, many stores called their rings "Wed-lok" right in our area. That was the unfortunate

Plaintiff's Exhibit R3—(Continued)
(Deposition of Benjamin B. Shapiro.)

situation. They are even doing it right now, as recently as the day before yesterday.

Q. Mr. Shapiro, if someone were to use the word, just advertised the word "lok" for rings, would you consider that as interfering with your business in the sale of "Wed-Lok" rings?

A. As far as that is concerned, I would say as long as we feature and have an investment in Granat Bros. merchandise, who have developed the term "lok" for a feature in their ring combinations, I would say it would, [42] seriously.

Q. Then, as far as you are concerned, Mr. Shapiro, as I understand your testimony, if the defendants in this action sold rings just under the word "feature" and nothing else, you wouldn't think that that was confusingly similar with the word "Wed-Lok," would you?

A. Well, if the principle was a copy of the "Wed-Lok" even under a different name, I would say that it would interfere with the sale of our merchandise.

Q. And it would cause confusion?

A. Yes.

Q. When you first began buying rings in May of 1947 from Granat Bros., that is, after they brought this new type out and began to put them out on the market again, did you have some conversations with anyone at Granat Bros. prior to the time that you purchased the rings?

Plaintiff's Exhibit R3—(Continued)
(Deposition of Benjamin B. Shapiro.)

A. As I said, back in '45, when I had lunch with the Granat Bros. people, they told me they were developing something that would revolutionize and be the most sensational development of this century. In fact, that was the term that was used.

Q. That was in '45, you say?

A. In the fall of '45, yes.

Q. I emphasize that because I think your testimony will show you used 1935 when you spoke on direct examination. [43]

A. No. If I did, I want to correct it, because it wasn't '35, it was in 1945. It was about ten years ago that we first started in with the "Wed-Lok."

Q. At that time was there some conversation about any patent on the ring?

A. Well, I have always taken for granted that anything that Granat Bros. would be working on, as diligently as they have for so many years, would be properly covered by patents.

Q. As a matter of fact, the word "patented" appears in a number of the ads which are exhibits now?

A. Yes; they gave us permission to because we understood that they were patented.

Q. They told you when you took on this line and bought these, that they would protect you, as far as patents are concerned and from anyone else imitating their ring?

A. From infringements, yes.

Plaintiff's Exhibit R3—(Continued)

(Deposition of Benjamin B. Shapiro.)

Q. When you sell these rings, Mr. Shapiro, when you box them, do you put them in your own boxes?

A. Yes, sir.

Q. Do you sell them through the mail as well as over the counter? A. Yes, sir.

Q. And when you sell them through the mail, you also put them in your own boxes? [44]

A. Yes.

Q. When I say "your own boxes," that is the box or the boxes with the name "LeRoy's" on it?

A. Yes, sir.

Q. I note in the ads which begin with Exhibit No. 43, I believe it is, on August 13th, that would be 1948, I notice that you use the words "This original 'Wed-Lok' ring." A. What is that?

Q. On August 13, 1948.

A. That was in combination when we started using—around there—the exclusive due to the fact that we were having so much difficulty and confusion there that we tried to acquaint the customers that we had with what we thought was the only, the original and the exclusive. That was the reason for it.

Q. When you say "the only and the original and the exclusive," you meant rings that locked together and were so locked together?

A. The "Wed-Lok."

Q. As a matter of fact, weren't you referring to rings that locked together when you said "the original"?

Plaintiff's Exhibit R3—(Continued)
(Deposition of Benjamin B. Shapiro.)

A. The "Wed-Lok" rings. In fact, the ad tells it just as it is. We tried to convey through the ads just exactly what we were selling and what the public could expect to get from LeRoy's. [45]

Q. That you tried to convey that other people were selling locked rings but that you were the original that brought out locked rings, is that correct?

A. Well, using the terms of the advertising, we couldn't very well say, "Now, here, anyone else in selling 'lok' rings is not doing the right thing." It isn't quite good business usage to put it that way.

Q. But that is what you thought and that is what you would like to have said?

A. Yes, indeed, we would like to have screamed that in headlines.

Q. The reason you would have liked to scream that was because when you took on this "Wed-Lok" ring you thought you were the only ones that would be able to sell a ring that was locked together, regardless of under what words they were sold?

A. We were assured that it was—and took for granted it was patented and we would be protected, and if we invested our money in that product, we could advertise it, feature it, and sell it and not have any infringements or anyone selling a product under a similar name and very often and even calling it "Wed-Lok" because salesmen in some of the stores don't draw such a fine line if a customer is

Plaintiff's Exhibit R3—(Continued)

(Deposition by Benjamin B. Shapiro.)

looking for a locking device ring; they call it "Wed-Lok." It isn't always with the knowledge and consent of the owner, however, because they have sales to make and commissions [46] to make and they are not going to lose a sale if they can avoid it.

Q. Now, Mr. Shapiro, if you were the first one, for example, to have brought a ring on the market that locked together, how would you have advertised it except using the word "lok" or "locking" in your advertisement to show what kind of a ring it was? Wouldn't you have had to use that?

Mr. Hursh: I will object to that as calling for speculation on behalf of the witness, what he would do if certain things happened. I do not think it is proper. It is calling for mere speculation on behalf of the witness.

Mr. Caughey: I wish to point out, as Mr. Hursh has very ably brought out before, this witness is very skilled in the business and he is well qualified to answer a question of this nature.

The Witness: I think I could, if you don't mind.

Mr. Hursh: You will have to answer the question.

The Witness: I would say that is something for the infringer to worry about; I wouldn't know how to do it myself.

Q. (By Mr. Caughey): I am talking about you, if you were the one to bring it out, the first one to bring this out, not Granat Bros.; if you were the

Plaintiff's Exhibit R3—(Continued)
(Deposition by Benjamin B. Shapiro.)

one who devised this locking ring, and let's assume that for the moment, [47] and you were advertising it to the public, how could you put over the features of the ring without using the word "lok"?

Mr. Hursh: The same objection.

The Witness: What shall I do?

Mr. Caughey: That is just for the record. Answer the question.

The Witness: I will answer it. I would just do like thousands of infringers do, just produce it and keep their fingers crossed and hope they would get away with it.

Q. (By Mr. Caughey): In other words, you would use the word "lok" to describe it?

A. If I were inclined to violate the law, there would be no other alternative; I would have to take chances.

Q. That is the best answer you can give to my question? A. Yes, that is.

Q. I will again ask you, and I am not so sure that you understood my question, Mr. Shapiro, in view of your answer—therefore, I will endeavor to make it clear by reframing it.

My question was this: If you, instead of Granat Bros., had been the first one to bring out a ring, which locked together, as "Wed-Lok" does lock together, and [48] you were putting it over and selling it and advertising it, how else could you get the principle of the ring, that is, that it locked together,

Plaintiff's Exhibit R3—(Continued)

(Deposition by Benjamin B. Shapiro.)

over to the public than by using the word "lok" in your advertisement? Wouldn't it be natural for you to so advertise the ring that it did lock together?

A. Yes, I guess I did misunderstand your original question. Yes, I guess that would be the only way.

Q. That would be the only way, would it not?

A. Yes; thanks for straightening me out on that.

Mr. Caughey: That is all.

Redirect Examination

By Mr. Hursh:

Q. During the war period, were other types of material difficult for your firm to secure?

A. Oh, indeed; that is what put gray hairs in my head.

Q. Mr. Shapiro, where is your store located? That is, with reference to the center of the downtown shopping area?

A. It is right in the very heart of the shopping area.

Q. What is the address of your store?

A. 633 South Broadway.

Mr. Hursh: That is all. [49]

Recross-Examination

By Mr. Caughey:

Q. Were you aware of the fact, Mr. Shapiro, at the time you began selling "Wed-Lok" rings and, particularly in May of 1947, that there were a

Plaintiff's Exhibit R3—(Continued)
(Deposition by Benjamin B. Shapiro.)

number of other concerns throughout the United States that put out products using the word "lok" as a part of the name under which they sold their products and including products which would be sold through jewelry stores?

Mr. Hursh: I would like to object to the question unless Mr. Caughey identifies the particular products on which the name "lok" was applied or to which the name "lok" was applied. The question is too general.

Q. (By Mr. Caughey): Were you aware of the fact, Mr. Shapiro, that the Freeman-Daugherty Company of Providence, Rhode Island, had previously sold jewelry for personal wear under the name of "Nu-Lok?"

Mr. Hursh: I will object to that unless the term "jewelry" is specified as to what particular type of jewelry is involved and, therefore, I object to the question as being indefinite.

Mr. Caughey: Would you answer the question, please?

The Witness: I have only known of one firm in my jewelry experience and career that has used the term "lok" in connection with jewelry and that was Granat Bros. If there were others, I didn't know about it. [50]

Q. (By Mr. Caughey): And did Granat Bros., to your knowledge, use the word "lok" in conjunction with any other words except "Wed-Lok?"

Plaintiff's Exhibit R3—(Continued)

(Deposition by Benjamin B. Shapiro.)

A. Yes.

Q. What were some of the others that they used?

A. Their rings, going back to approximately ten years ago, that we handled and sold in our store.

Q. Were you familiar with the fact that Jacques Kreisler Sales Corporation of New York, prior to the time of May, 1947, had been using the word "Dubl-Lock" for wristwatch bracelets?

A. I don't recall, but if they did, I never noticed it.

Q. Have you ever heard of the trademark "Gem Lock" as used by the Gemex Company of Newark, New Jersey, for bracelet attachments?

A. I imagine in connection with the word "lock," I guess I lock the door of my car and my house, but in connection with rings, I have never heard the term "lock" used other than by Granat Bros.

Q. You are, naturally, as a merchant who is selling "Wed-Lok" on a large scale in Los Angeles and particularly on Spring Street——

A. On Broadway.

Q. ——you are naturally concerned about anybody else selling rings with locks, in Los Angeles and, particularly [51] adjacent Spring Street, when they use the word "lok" as a part thereof, isn't that correct, as a part of the name under which they sell

Plaintiff's Exhibit R3—(Continued)
(Deposition by Benjamin B. Shapiro.)

the rings? You are naturally concerned, is that right?

A. Well, if the infringement—if it infringes the name and the construction on goods that I have invested my money in, I would be foolish not to be concerned.

Q. As you previously testified, if they use the word "lok" regardless of what word they used it with, in your opinion, that would be confusing, that would lead to confusion?

A. Well, if it infringed, I would say it would, very much so.

Mr. Caughey: That is all.

Mr. Hursh: That is all.

/s/ BENJAMIN B. SHAPIRO.

Subscribed and sworn to before me this 14th day of March, 1949.

[Seal] /s/ HORACE E. SNYDER,

Notary Public in and for the County of Los Angeles, State of California. [52]

State of California,
County of Los Angeles—ss.

I, Mack M. Racklin, a Notary Public in and for the County of Los Angeles, State of California, do hereby certify that Benjamin B. Shapiro, the witness named in the foregoing deposition, was, before

Plaintiff's Exhibit R3—(Continued)
(Deposition by Benjamin B. Shapiro.)

the commencement of his deposition, duly sworn to testify the truth, the whole truth, and nothing but the truth; that said deposition was taken, pursuant to notice at the time and place as herein set forth; that said deposition was taken down in shorthand by me and thereafter transcribed into typewriting, and I hereby certify the foregoing 52 pages contain a full, true and correct transcription of my shorthand notes so taken.

I further certify that it was stipulated by counsel that said deposition may be read, corrected and signed by the witness before any notary public in and for the County of Los Angeles, State of California.

I further certify that I am neither counsel for nor related to any party to said action, nor in anywise interested in the outcome thereof.

In Witness Whereof, I have hereunto subscribed my name and affixed my seal, this 24th day of February, 1949.

[Seal] /s/ MACK M. RACKLIN,
Notary Public in and for the County of Los Angeles, State of California.

Nos. 12,407 and 12,408

IN THE

United States Court of Appeals

For the Ninth Circuit

SAMUEL H. FRIEND, et al., *Appellants,* vs. GRANAT BROS. (a corporation), *Appellee.*	No. 12,407
GRANAT BROS. (a corporation), *Appellant,* vs. SAMUEL H. FRIEND, et al., *Appellees.*	(CONSOLIDATED CASES)
HERBERT BROWN, et al., *Appellants,* vs. GRANAT BROS. (a corporation), *Appellee.*	No. 12,408
GRANAT BROS. (a corporation), *Appellant,* vs. HERBERT BROWN, et al., *Appellees.*	

OPENING BRIEF ON BEHALF OF APPELLANT, GRANAT BROS.

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Nos. 12,407 and 12,408

IN THE

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GRANAT BROS. (a corporation), *Appellant,* vs. HERBERT BROWN, et al., *Appellees.*	

OPENING BRIEF ON BEHALF OF APPELLANT, GRANAT BROS.

JURISDICTION.

The jurisdiction of this Court is invoked under Sections 1291 and 1338(a) and (b) of Title 28 U.S.C.A. as the suit is one arising under the Trade-Mark Laws of the United States of which the District Court had jurisdiction and of which this Court has appellate jurisdiction.

BRIEF STATEMENT OF THE CASE.

This action was brought in the District Court for unfair competition and infringement of a trade-mark registered under the laws of the United States.

Briefly, commencing in 1936, the plaintiff-appellant marketed a diamond wedding and engagement ring ensemble and trade-marked the same "WED LOK". Such sets have been continuously sold and used throughout the entire United States since that time. The appellant, in advertising its ring sets "WED LOK", spent, in accordance with the evidence, some one hundred fifty-three thousand dollars ($153,000.00), in addition to which the said trade-marked products were widely advertised under the mark "WED LOK" by various dealers in various newspapers in almost every city in the United States of any appreciable size. The appellant during that period did business in practically every state in the United States in its "WED LOK" products, and the trade-marked "WED LOK" products were advertised in such nationally prominent magazines as "Vogue".

During the period from approximately 1936 to 1948, appellant did in excess of three million dollars

($3,000,000.00) in business in its said ring sets trade-marked "WED LOK", and the evidence shows that that trade-mark and trade-marked products were widely known throughout the United States.

Appellees had long been in the same business as appellant; that is, the ring business, but commencing in 1948 appellees adopted for their wedding ring ensembles the trade-mark "FEATURE LOCK", full knowing at the time of appellant's trade-marked ring ensembles "WED LOK". The evidence will show that at that time there were no rings being commercialized having a compound trade-mark including the word "LOCK" as a suffix, except appellant's trade-mark "WED LOK".

At that time appellant had a sales policy of selling their rings through relatively few dealers in each city, and we contend that the remainder of the dealers in each city immediately seized upon the appellees' product "FEATURE LOCK" because of the demand created and the good will built up on behalf of the trade-marked products "WED LOK". In fact, when appellees commenced selling their rings marked "FEATURE LOCK", they advised their customers that appellees would stand behind them in case of any trade-mark litigation.

We contend that because of the popularity and the widespread advertising and the widely known reputation of "WED LOK" products, the appellees' rings became almost immediately successful, and their dealers were not satisfied with merely selling them as "FEATURE LOCK", but immediately named them

"ETERNA LOCK", "TRULOCK", "BRIDALOK" and other similar designations including the word "LOCK" or "LOK" as a suffix to the compound trade-mark. Appellees also agreed to hold these users of these marks harmless in any trade-mark litigation instituted by this appellant.

Therefore, after being alone in the field with its trade-mark including the suffix "LOK" for rings and building up a valuable widespread reputation therefor by extensive advertising and sales effort for a period of twelve (12) years, appellant was immediately faced with a complete dilution of its trade-mark rights and good will by the appearance of this host of appellees' rings marked with the various compound trade-marks including the word "LOCK". In fact, one of appellees' own witnesses testified that without the use of the word "LOCK" at the end of his trade-mark, he would not care to continue handling the appellees' rings.

Appellant, therefore, promptly brought this suit for trade-mark infringement and unfair competition based on the premises that the compound trade-mark "FEATURE LOCK" infringed the registered trade-mark "WED LOK" and would likely result in confusion between the products of the appellant and the products of appellees, and in confusion as to the source of the products and dilution of the trade-mark rights and good will of appellant, and also for unfair competition for such interference with its business and dilution of its good will in that, broadly speaking, the law of trade-mark infringement and unfair competition springs from the same basic law.

The appellant seeks an injunction restraining appellees* from using the mark "FEATURE LOCK" in a trade-mark sense as applied to finger rings but without any restraint on such use of the word "FEATURE". The appellant expressly waived damage and an accounting. In other words, the situation of the appellant in this case is much the same as was the case of the appellant before this Court of Appeals in *Stork Restaurant, Inc. v. Sahati, et al.,* 166 Fed. (2d) 348, decided February 18, 1948, wherein the late Judge Garrecht so aptly expressed the position of the plaintiff in a suit of this sort:

> "The appellant is not here seeking to have the appellees mulcted in damages, nor is it striving to drive them out of business. It asks merely that its adversaries be compelled to desist from an unfair trade practice that threatents to 'nibble away', 'whittle away', or 'dilute' the value of its dearly-bought prestige.
>
> "The appellant begs that the appellees, with an 'infinity' of other names to choose from, divest themselves of plumage borrowed from the Stork.
>
> "In a word, the appellant is making a plea peculiarly calculated to move the conscience of a chancellor. It prays not for a sword, but for a shield."

---

*The term "appellees" will be used to denote in this brief all of the appellees as well as the intervening defendant below Feature Ring Co.

ASSIGNMENT OF ERRORS.

1. The Court erred in finding that the evidence fails to show confusion in the ultimate customers between the products marked "FEATURE LOCK" and appellant's products marked "WED LOCK" and that neither trade-mark infringement or unfair competition was established because such finding is contrary to the evidence and is not supported by substantial evidence.

2. The Court erred in concluding as a matter of law that appellant failed to establish trade-mark infringement or unfair competition by appellees because no confusion was shown between the ultimate customers of appellant and appellees.

3. The Court erred in concluding that the trade-mark "FEATURE LOCK" does not infringe upon the trade-mark "WED LOK".

4. The Court erred in concluding that the appellees have not unfairly competed with appellant.

5. The Court erred in finding that the words "FEATURE LOCK" are sufficiently distinct from "WED LOK" as to preclude likelihood that the appellee, Feature Ring Co.'s products will be passed off as those of appellant.

6. The Court erred in not finding that the trade-mark "FEATURE LOCK" infringes upon the trade-mark "WED LOK".

7. The Court erred in not finding that appellees have unfairly competed with appellant.

8. The Court erred in not finding that the evidence shows confusion in the ultimate customers between the

products marked "FEATURE LOCK" and appellant's products marked "WED LOK" and that trade-mark infringement and unfair competition was established.

9. The Court erred in not finding that the words "FEATURE LOCK" are not sufficiently distinct from "WED LOK" as to preclude likelihood that appellee, Feature Ring Co.'s products will be passed off as those of appellant.

10. The Court erred in not finding that appellant's trade-mark "WED LOK" had acquired a secondary meaning in the trade as designating the products of appellant and solely appellant.

SUMMARY OF ARGUMENT.

1. Appellant's right to an injunction is founded upon the broad law of unfair competition and trade-mark infringement and not upon any statutes relating to registration.

Appellant submits that when the broad principles of the law of unfair competition and trade-mark infringement are applied to the facts and evidence of this case, an injunction should issue against the appellees. Under the modern law of unfair competition and trade-mark infringement it is unnecessary to prove actual palming off of infringers' goods for those of the owner of a trade-mark and it is unnecessary to prove confusion in the trade. Therefore, the District Court in basing its decision upon lack of evidence of such confusion was in error. As a matter of fact, the record is complete in establishing "confusion of

source" of appellees' products among the customers of appellant's wholesale jewelry business. The appellees' products are not only known under the trade-mark "FEATURE LOCK" but are known in the trade under the trade-marks: "KIN LOCK", "BRIDA-LOK", "ETERNA LOCK", "LOVE LOCK", "RHAPSODY LOCK", "MAGNOLIA LOCK", "INVISIBLE LOCK" and "TRU LOCK". This widespread use of confusingly similar trade-marks on identical products has the effect of whittling away and diluting appellant's trade-mark rights and good will. This "confusion of source" and dilution are sufficient grounds upon which to base injunctive relief.

2. Appellant's trade-mark "WED LOK" has been used, known and extensively advertised throughout the United States.

The record establishes that the trade-mark "WED LOK" has been used continuously and exclusively by appellant since at least the year 1936. It also establishes that appellant has dealers in 47 states, the Territory of Hawaii and the District of Columbia, and that its dealers number 1,069. Appellant has widely advertised its trade-mark "WED LOK", expending approximately $153,000.00 exclusive of dealer advertising, which would amount to many additional thousands of dollars. It is, therefore, submitted that appellant's trade-mark is entitled to protection.

3. Appellant is entitled to the exclusive use of the word "LOK" or "LOCK" when used as a suffix in a trade-mark in conjunction with wedding and engagement ring ensembles.

The appellant has enjoyed exclusive use, since 1936, of the words "LOK" or "LOCK" as a suffix in a

trade-mark used in conjunction with wedding and engagement ring ensembles, and it was not until the belated entry in 1948 of appellees that this exclusive use of appellant was disturbed. The use by a competitor of a trade-mark embodying the word "LOK" or "LOCK" as a suffix is likely to cause confusion in the trade and therefore appellees by their use of such trade-mark are guilty of trade-mark infringement and unfair competition.

4. The lower court erroneously construed the law of trade-mark infringement and unfair competition as requiring for relief: (A) Actual confusion in the ultimate customers between appellant's and appellees' products; and (B) Such similarity of trade-mark as would likely result in "palming off" of appellees' products as appellant's products.

It is submitted that the Findings and Conclusions made by the District Court erroneously construed the law of trade-mark infringement and unfair competition because the District Court based its decision of non-infringement and lack of unfair competition on the grounds that no confusion of ultimate customers was established and the trade-marks were not so similar as would likely result in "palming off" of appellees' products as those of appellant. This theory of the District Court is entirely contrary to the established modern law of trade-mark and unfair competition and, therefore, the District Court was in error.

The lower Court should have based its opinion on "confusion of source" and "dilution of good will" which were fully established on the record and which are controlling factors in trade-mark and unfair competition cases.

5. **The appellant is entitled to an injunction upon the theory of unfair competition.**

Appellant's trade-mark "WED LOK" is a distinctive and valid trade-mark and was so found by the District Court (R. 41). As such it is entitled to the utmost protection. Appellant has expended thousands and thousands of dollars in advertising its trade-mark "WED LOK" and has employed this trade-mark on its goods since 1934. Such an advertising campaign and investment has created in appellant a tremendous good will in the trade-mark "WED LOK" and has entitled appellant to protection against infringers and unfair competition. The appellees' sole purpose in its wilful appropriation of a confusingly similar designation for its products is to trade upon appellant's "good will" and to "reap" the benefits of the market established by appellant for its trade-marked products.

6. **Where appellant's mark or trade name has come to have a secondary meaning, such mark or trade name will be protected even though such mark or trade name is not the proper subject matter of a valid trade-mark per se.**

The record establishes long and continued exclusive use and widespread advertising of the trade-mark "WED LOK" by appellant, and it also establishes that those in the jewelry trade recognize the trade-mark "WED LOK" as that of appellant and no one else. Such evidence establishes a secondary meaning in the trade as designating the products of appellant.

APPELLANT'S RIGHT TO AN INJUNCTION IS FOUNDED UPON THE BROAD LAW OF UNFAIR COMPETITION AND TRADE-MARK INFRINGEMENT AND NOT UPON ANY STATUTES RELATING TO REGISTRATION.

Symbols as trade-marks have been used to identify origin of articles for at least four thousand (4000) years. It was not, however, until some time late in the 18th or early in the 19th century that courts commenced to protect them against imitation. And, it was with the advent of such protection in England against those who used or imitated such marks upon their own goods that what has come to be known as the "common-law trade-mark" began to be defined.

A "common-law trade-mark" is a mark which may be appropriated to the use of one person under the rules of common law.

The term "technical trade-mark" as it is generally used has come to be practically synonymous with "common-law trade-mark".[1]

In the United States the exclusive right to the use of a trade-mark has always rested and still rests on the common law.[2]

This right "was not created by the act of Congress, and does not now depend upon it for its enforcement. The whole system of trade-mark property and civil

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[1]*Mishawaka Rubber & Woolen Manufacturing Co. v. Kresge Co.*, 119 Fed. (2d) 316, 323 (C.C.A. 6, 1941).

[2]*Trade-Mark Cases*, 100 U.S. 82, 93 (1879), 25 L.ed. 550; *United Drug Co. v. Rectanus*, 248 U.S. 90, 98 (1918), 63 L.ed. 141, 39 S. Ct. 48; *American Steel Foundries v. Robertson*, 269 U.S. 372, 381 (1926), 70 L.ed. 371, 46 S.Ct. 160; *United States Printing & Lithograph Co. v. Griggs, Cooper & Co.*, 279 U.S. 156, 158 (1929), 73 L.ed. 560, 49 S.Ct. 267, 1 PQ 245.

remedies for its protection existed long anterior to that act (viz., Act of July 8, 1870), and have remained in full force since its passage".[3]

The trade mark statutes have as their purpose *not the creation* of trade-marks but remedies for their enforcement (*Carroll v. McIlvaine,* 171 Fed. 125), which are principally:

1. The necessity of proving adoption and continued use is avoided, since the registration creates a presumption of such adoption and use, sufficient to make a *prima facie* case.

2. The registration tends to give notice to the public of the claim to the trade-mark.

3. The registered owner in some instances may recover triple damages.

4. Suit may be brought in the federal courts to protect a mark which is registered, without restriction as to amount involved or necessity for proving diversity of citizenship.

The difference between the act of 1905 and that of 1920 is that there is no presumption of adoption and use (ownership).

> *Armstrong Paint & Varnish Works v. Nu-Enamel Corporation, et al.,* 305 U.S. 315, 59 S.Ct. 191.
>
> "* * * The significant distinction between the two acts is the omission in the 1920 act of the provision of section sixteen of the earlier act

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[3]*Trade-Mark Cases,* 100 U.S. 82, 93 (1879), 25 L.ed. 550.

making the registration of a trade-mark prima facie evidence of ownership."

Thus, the appellant's right in the case at bar to an injunction is based upon the broad substantive law of unfair competition and not the statutes relating to registration. As was said: "The entire substantive law of trade-marks (excepting statutory provisions and construction) is a branch of the broader law of unfair competition." (*Capewell Horse Nail Co. v. Mooney,* 172 Fed. 826 (C.C.A. 2, 1909), 97 CCA 248, and *Elgin v. Illinois Watch Co.,* 179 U.S. 665, 674, 45 L.Ed. 365, 21 S.Ct. 270 (1901).

Thus, the decisions in trade-name cases as to substantive rights are as applicable here as cases strictly confined to trade-marks *per se.*

APPELLANT'S TRADE-MARK "WED LOK" HAS BEEN USED, KNOWN AND EXTENSIVELY ADVERTISED THROUGHOUT THE UNITED STATES.

The evidence shows that appellant's trade-mark "WED LOK" has been used and extensively advertised since 1934 by appellant and that appellant has a tremendous good will and investment in said trade-mark "WED LOK" (Finding XI, R. 40).

Exhibit AA (R. 762-816) establishes that appellant sells directly to dealers in 47 states, the Territory of Hawaii and the District of Columbia. These dealers are located in 602 cities and towns throughout the United States, Territory of Hawaii and the District

of Columbia; and that said dealers number 1,069. It is thus seen that this business of appellant has grown to tremendous proportions, and that its trade-mark "WED LOK" has been used and has become known throughout the entire country. It has also been established on the record that the appellant has spent, in advertising the trade-mark "WED LOK", approximately $153,000.00 (Finding XI, R. 40). This expenditure does not take into consideration the tremendous volume of dealer advertising that has gone on, and as shown by Exhibits DD, EE and FF which are before this Court as physical exhibits. This dealer advertising of the trade-mark "WED LOK" would amount to many, many additional thousands of dollars.

This widespread use and extensive advertising of a trade-mark has developed into a valuable property right that should be protected by a court of equity. Great weight should be given by such Court to such evidence in determining whether or not a competitor is endeavoring to cash in on the reputation of another. In other words, one should not be allowed to "reap" where one has not "sown". This Court has confirmed this rule in the case of *Stork Restaurant, Inc. v. Sahati,* 166 Fed. (2d) 348, at 356, where Judge Garrecht, in discussing the effect of advertising, stated:

> "The amount of advertising that the senior appropriator has given to his trade name is another element that the courts will take into consideration in determining whether he is entitled to redress against a junior appropriator.
>
> In Lady Esther, Limited v. Flanzbaum, supra, D.C., 44 F. Supp. at pages 668, 669, the court

carefully itemized the advertising outlay of the complainant, and found that it totaled more than a million dollars a year for six years. In granting the complainant an injunction, the court observed:

'The trade name "Lady Esther" is fanciful. The complainant has spent large sums of money in advertising to build up good-will and to make its trade-name and products known to the purchasing public. The complainant used the trade-name for about twenty-nine years before the respondent adopted it in his business.

'Assuming that the respondent adopted the trade-name "Lady Esther" because, as his son testified, it was the nickname of his son's wife and the adoption was made in good faith, I do not believe that it can be charged to coincidence that the respondent adopted practically the same script on his advertising signs and on his products as the complainant used in its trade-mark on its products.' "

* * * * * * *

" 'Reaping Where One Has Not Sown'.

The decisions frequently refer to this sort of imitation as 'reaping where one has not sown' or as 'riding the coattails' of a senior appropriator of a trade name.

By whatever name it is called, equity frowns upon such business methods, and in proper cases will grant an injunction to the rightful user of the trade name."

* * * * * * *

" 'These cases all hold that where as here it plainly appears that there is a purpose to reap where one has not sown, to gather where one has

not planted, to build upon the work and reputation of another, the use of the advertising or trade name or distinguishing mark of another, is in its nature, fraudulent and will be enjoined.' "

APPELLANT IS ENTITLED TO THE EXCLUSIVE USE OF THE WORD "LOK" OR "LOCK" WHEN USED AS A SUFFIX IN A TRADE-MARK IN CONJUNCTION WITH WEDDING AND ENGAGEMENT RING ENSEMBLES.

The appellant, since at least 1936, has been in exclusive possession of the trade-mark "WED LOK" for wedding rings and, as a matter of fact, has enjoyed exclusive use during this period of the words "LOK" or "LOCK" as a suffix in a trade-mark used in conjunction with wedding and engagement ring ensembles. It was not until the belated entry into the field of appellee, in 1948, that the exclusive use of the word "LOK" or "LOCK" by appellant was disturbed when appellees used the trade-mark "FEATURE LOCK" for their rings. In addition to this, of course, there is the subsequent "hatching out" of the trade-marks "KIN LOCK", "BRIDALOK", "ETERNA LOCK", "LOVE LOCK", "RHAPSODY LOCK", "MAGNOLIA LOCK", "INVISIBLE LOCK" and "TRU LOK". Another important fact that should be given consideration by this Court is that the appellees in employing the word "LOCK" as a part of their trade-mark met with immediate success in the distribution and sale of their rings. Mr. Peterson testified at R. 312-315 that the success of ap-

pellee, Feature Ring Co., in the sale of its "FEATURE LOCK" trade-marked products was immediate. There was no slow step by step progress in establishing a market for these trade-marked products. The reason for this is clearly apparent. Appellant had established a market for goods employing a trade-mark with the suffix "LOK" and the trade was well informed with respect to such a trade-mark. Further, the jewelers who purchased such goods on the wholesale market thought that the appellees' products were those of appellant (see testimony of Jacoby at R. 446; Goldblatt at R. 508; Jackson at R. 474; Navarro at R. 582 and Shapiro at R. 694).

Appellant by its long use of the word "LOK" as a suffix in its trade-mark designating ring ensembles, is entitled to the exclusive use of the word "LOK" or "LOCK" in this field.

This is in full accord with the authorities.

Kraft Cheese Co. v. Leston Co., 43 Fed. Supp. 782 (1941).

> In this case the plaintiffs owning the trade-mark "Miracle Whip" sought to restrain the mark used by defendant, "Leston's Salad Whip". The Court found as facts:
>
> (1) That prior to adoption of "Miracle Whip" other manufacturers of mayonnaise and salad dressing had used the word "whipped" in a descriptive sense for the purpose of indicating that their products were beaten or whipped in the process of manufacture.

(2) That the composite mark "Miracle Whip" and also the word "Whip" alone have become well known to the consuming public and to the trade as indicating plaintiff's salad dressing.

(3) That the name "Leston's Salad Whip" was adopted after defendant had full knowledge of plaintiff's "Miracle Whip" use.

In view of the above facts, the Court held that plaintiff was entitled to the exclusive use of the mark "Whip" as applied to salad dressing, and that the mark "Salad Whip" infringed the plaintiff's rights, and that the plaintiff was entitled to an injunction restraining defendant's use of the word "Whip" in connection with the use of the mark "Salad Whip".

Note that the trade-mark "Miracle Whip" was sustained by two additional District Courts.

Kraft-Phenix Cheese Corporation v. Goldfarb, et al. (D. C. Calif.), 7 F. Supp. 199;

Kraft-Phenix Cheese Corporation v. R. E. Robertson, Inc. (D. C. Mich.), 9 F. Supp. 125.

This Court in the case of *N. K. Fairbank Co. v. Luckel, King & Cake Soap Co.*, 102 Fed. 327 (C.C.A. 9, May 7, 1900), held that a trade-mark employing identical prefixes conflicted. In that case the Court held that "Gold Dust" was infringed by the name "Gold Drop", despite the fact that entire dissimilar labels were adopted by the infringer. In discussing the question of infringement, the Court said:

"This is a suit in equity. It was instituted to restrain the infringement of the trade-mark or trade name 'Gold Dust', used to designate a washing powder manufactured and sold on the market by appellant. The alleged infringement consists of the use of the name 'Gold Drop' to designate a washing powder manufactured and sold by appellee. * * *

"The testimony shows that respondent at the time it commenced the manufacture of its washing powder 'Gold Drop' was well aware of the existence of complainant's 'Gold Dust,' and that it had been extensively and expensively advertised in Oregon as well as in other states; * * *

"The law is well settled that in suits of this character the intention of the respondent in adopting the style of package, or choosing a name for a similar product, is to a certain extent immaterial. It is not essential to the right of complainant to an injunction to show absolute fraud or willful intent on the part of the respondent. Upon familiar principles, it will be presumed that the respondent contemplated the natural consequences of its own acts. If the acts of respondent in the adoption of the name 'Gold Drop' constituted an infringement of the trade-mark or trade-name of the complainant, and it was put on the market in such a manner as to interfere with the legal rights of complainant, to its loss and injury, it would be entitled to an injunction, irrespective of the question of any testimony as to actual fraud or willful intent. The Court must determine the intent from respondent's acts and the results produced thereby. R. Henisch & Sons v. Boker (C.C.), 86 Fed. 766, 769.

"* * * It must constantly be borne in mind that there are two kinds of trade-marks—one of peculiar pictures, labels, or symbols; the other in the use of a name. The infringement charged herein is in the adoption by the respondent of both the trade-name and trade-mark. So far as the name 'Gold Dust' is concerned, the dissimilarity of the labels, size of packages, and character of symbols can make no essential difference. As was said in Hier v. Abrahams, 82 N. Y. 519, 525:

" 'The trade-mark consisted in the word simply, and the plaintiffs might have printed it on any form of label they might fancy, without losing the protection of the law. The defendants had no right to adopt it by merely putting it on a label of different fashion from that which the plaintiffs had been in the habit of using.'

* * * * * * *

"The trade-name differs from the trade-mark in this: that one appeals to the ear more than to the eye. The advertisements of the name were for the purpose of having the intended purchaser ask for 'Gold Dust' without his having any knowledge of the character of the label on the package he was to receive, and in this sense the fact that the infringer of the name used different devices and symbols would have no great force. The imitation of the name 'Gold Dust', by which the soap or washing powder of complainant was known, would constitute an infringement, because purchasers would be liable to be misled who had no knowledge of the article except the advertised name as being the best soap or washing powder in the market. It is not unusual for a certain specific article advertised extensively, of reputed ex-

> cellence, to become publicly known and called for by the name which is more readily retained in the memory. This is one of the reasons why respondent selected the name 'Gold Drop',—'on account of its being short; good for advertising, and easy to remember.' "

It is submitted that appellant has established a market for wedding and engagement ring ensembles under a trade-mark embodying the word "LOK" or "LOCK" as a suffix, and any one who adopts a trade-mark employing this word is likely to cause confusion and is therefore guilty of trade-mark infringement and unfair competition.

THE TRIAL COURT ERRONEOUSLY CONSTRUED THE LAW OF TRADE-MARK INFRINGEMENT AND UNFAIR COMPETITION AS REQUIRING FOR RELIEF (A) ACTUAL CONFUSION IN THE ULTIMATE CONSUMERS BETWEEN APPELLANT'S AND APPELLEES' PRODUCTS, AND (B) SUCH SIMILARITY OF TRADE-MARKS AS WOULD LIKELY RESULT IN "PALMING OFF" OF APPELLEES' PRODUCTS AS APPELLANT'S PRODUCTS.

Proof of palming off and confusion in ultimate customers is unnecessary to granting relief to appellant.

The major premises relied upon by the District Court in refusing relief to appellant are that the appellant failed to establish that appellees had palmed off their goods as those of appellant, and that appellant failed to establish confusion in ultimate customers between the products of appellant and appellees. In other words, appellant did not establish that the purchasing public that enters a retail jewelry store and buys an engagement-wedding ring ensemble was

confused between the trade-marks "FEATURE LOCK" and "WED LOK" and, further, appellant did not prove any instances wherein the products of the appellees were passed off to the purchasing public as the products of appellant.

The law is well established that such proof is unnecessary. The District Court seemingly based its entire decision of non-infringement and lack of unfair competition on these two premises. This is clearly established by Findings of Fact Nos. XIII and XIV and Conclusions of Law No. V which state:

> FINDINGS OF FACT XIII.
>
> "That the words 'Feature Lock' are sufficiently distinct from 'Wed-Lok' as to preclude likelihood that the Feature Ring Co.'s product will be passed off as those of plaintiff."
>
> FINDINGS OF FACT XIV.
>
> "The evidence fails to show confusion in the ultimate customers between the products marked 'Feature Lock' and plaintiff's products marked 'Wed-Lok,' and neither trade-mark infringement nor unfair competition is established."
>
> CONCLUSIONS OF LAW V.
>
> "That no confusion was shown between the ultimate customers of plaintiff and defendants and therefore plaintiff failed to establish trade-mark or unfair competition by defendants."

The rule that actual deception and damage is unnecessary to injunctive relief was discussed in the

recent case of *Stork Restaurant, Inc. v. Sahati et al.*, 166 Fed. (2d) 348, at 359, and in this respect this Court of Appeals stated the following:

> "The appellees stress the fact that the appellant has failed to show that 'appellees' operation in any way has injured appellant,' etc.
>
> Neither under the California jurisprudence nor under the general law is such showing necessary. The California decisions, indeed, are overwhelmingly in accord on this point.
>
> In the motion picture case, supra, 15 Cal. (2d) at pages 691, 692, 104 P. (2d) at page 653, the Supreme Court of the State thus enunciated the rule: 'And it does not appear necessary that the parties be in competitive businesses or that the injury has already occurred. It is sufficient if the names, although not identical, are sufficiently similar to cause confusion and injury. (Cases cited.)'
>
> And in the recent case of Winfield v. Charles, supra, 77 Cal. App. (2d) at page 70, 175 P. (2d) at page 73, we find the following succinct statement: 'It is unnecessary, in such an action, to show that any person has been confused or deceived. It is the likelihood of deception which the remedy may be invoked to prevent.'
>
> This is undoubtedly the Federal rule. In Adolph Kastor & Bros. v. Federal Trade Commission, 2 Cir., 138 F. (2d) 824, 826, the court thus summarized the doctrine: 'No one need expose his reputation to the trade practices of another, even though he can show no pecuniary loss.' "

In the case of *G. H. Mumm Champagne v. Eastern Wine Corporation*, 142 F. (2d) 499, 501 (C.C.A. 2), the

lower court's decree enjoining defendant from using plaintiff's mark "Mumm's Champagne" on champagne was affirmed, the Court of Appeals saying:

> "The defendant argues, however, that, while in the case of a trade-mark infringement, it is not necessary to show instances of actual confusion, it is necessary to do so in cases of unfair competition, *and concededly none have been shown.* It is of course true that to recover damages or profits, whether for infringement of a trade-mark or for unfair competition, it is necessary to show that buyers, who wished to buy the plaintiff's goods, have been actually misled into buying the defendant's; but *when the question is of an injunction, we can find as little warrant for demanding evidence of actual confusion in cases of unfair competition as in those of trade-mark.*" (Emphasis ours.)

In *S. C. Johnson & Son v. Johnson,* 116 F. (2d) 427, 429 (C.C.A. 2), the defendants used "Johnson's Household Cleaner" on cleaning fluid for rugs, etc.; plaintiff used "Johnson's" on floor waxes and the like. The District Court's decree in favor of plaintiff was modified and affirmed by the Court of Appeals and on the question of confusion of customers it was said:

> "Obviously the plaintiff cannot stand upon the usual grievance in such cases; i.e., that the defendant is diverting its customers. It *has no customers to divert,* for it does not sell a cleaner for fabrics; and, as to glazed surfaces, it began to sell its cleaner for these after the defendant; it was the newcomer in that market. Therefore it invokes the doctrine that when a good will is established under

> the owner's name, given or assumed, he may protect it, not only against the competition of those who invade his market, but also against those who use the name to sell goods near enough alike to confuse his customers. We have often so decided, and it is not necessary to do more than refer to our last discussion. Emerson Electric Mfg. Co. v. Emerson Radio & Phonograph Corp., 105 F. (2d) 908." (Emphasis ours.)

Again in *Wisconsin Electric Co. v. Dumore Co.,* 35 F. (2d) 555, 558 (C.C.A. 6), the Court ruled:

> "It was not essential that plaintiff prove any particular injury or that any purchaser was misled. Bickmore Gall Cure Co. v. Karns, 134 F. 833, 835 (C.C.A. 3). It is sufficient if there was manifest liability to deceive, Ralston Purina Co. v. Western Grain Co., 23 F. (2d) 253, 255 (C.C.A. 5), or, if there was reasonable probability of injury. Peninsular Chem. Co. v. Levinson, supra."

In *United Dressed Beef Co. v. United Butchers,* 262 N.Y.S. 562, the plaintiff and defendant engaged in the same business, using their respective names above. Defendant was enjoined from using the word "United", the Court holding:

> "It is not necessary to show that there has been any confusion or loss of business as a result of the similarity of names."

It is submitted that the District Court held contrary to law when it based its decision of non-infringement and lack of unfair competition on the ground that "no confusion in the ultimate customers between the prod-

ucts marked 'FEATURE LOCK' and plaintiff's products marked 'WED LOK' " was proven. Such a showing under the above authorities was unnecessary and lack of such a showing is not proper grounds upon which to base a decision of non-infringement and lack of unfair competition.

It is submitted that the District Court's Findings in both of these respects is contrary to the law.

Confusion of source.

Appellant's position was misconstrued by the lower Court in that said lower Court refused to issue an injunction on the grounds that there was no palming off of appellees' products for those of appellant and that there was no "confusion in the ultimate customers."

The District Court failed to recognize that the appellant is engaged in two distinct types of business, both of which types are entitled to protection. First, the appellant in the Bay Area has a retail business, the ultimate customers being the general public residing in this area. Second, and by far the largest portion of appellant's business in its trade-marked goods, is its wholesale business where so far as appellant is concerned its ultimate customers are retail jewelry stores throughout the country.

Certainly the evidence adduced in this case established "confusion of source" in these customers of the appellant in its wholesale business. For example, the witnesses Jacoby (R. 446-447), Jackson (R. 474), Goldblatt (R. 508-509), Navarro (R. 582-583) and

Shapiro (R. 569-595) each testified that they were confused as to the source of the "FEATURE LOCK" rings when said rings first came to their attention and that they thought these rings were a product of Granat Bros., the appellant herein.

This "confusion of source" theory is applicable in the wholesale trade as well as in the retail trade. The appellant should not be penalized because it is engaged in the wholesale jewelry business, and its trade-marks which are a part of its good will and assist in establishing appellant's reputation in the industry should not be subject to this "dilution" and "whittling away" by competitors. Appellant, in the protection of its reputation and good will, should be able to enjoin competitors from confusing its customers and from the possibility of confusing potential customers.

Appellant has a tremendous investment in the good will attendant upon its trade-mark "WED LOK" and is seeking only protection of this valuable property right. From the multitude of names appellees had to choose from in selecting a name for its rings, there was little need for it to adopt one that was so confusingly similar to appellant's trade-mark. The cause of this "confusion of source" rests squarely upon the shoulders of the appellee, Feature Ring Co., Inc., and as was said in the case of *Cleo Syrup Corporation v. Coca-Cola Co.,* 8th Circuit, 139 Fed. (2d) 416-417 (cert. denied 321 U. S. 781):

> "* * * There is no merit in the contention that a court of equity will not afford protection to the plaintiff's trade-mark or prevent its good will from being nibbled away by unfair competitors."

Another important factor to be considered in this regard is that the appellee, Feature Ring Co., knew at the time it originally adopted the trade-mark "FEATURE LOCK" and sold rings under said trade-mark that there was going to be "confusion of source" between the two trade-marks "WED LOK" and "FEATURE LOCK" and warned its customers of this fact. This is established by the testimony of Leonard V. Block, one of the partners of appellee, Samuel H. Friend, where at R. 400 he testified as follows:

> "A. Yes, sir, that is the only letter I could find of like import. Most of the customers when I originally showed them the item, I told them that if there was any question that we would back up—that the Feature Ring Co. would back them up.
>
> Q. In other words, you anticipated that there would be trademark litigation?
>
> A. Yes."

If appellee, Feature Ring Co. Inc., in good faith adopted its trade-mark "FEATURE LOCK", why did it have to anticipate trade-mark infringement? Why was it necessary for it to tell its wholesale distributors and, in turn, have its wholesale distributors inform their customers that "the Feature Ring Co. would back them up" in any trade-mark infringement case with Granat Bros. The answer to these questions is self-evident. Both Feature Ring Co., Inc. and Samuel H. Friend knew that the adoption of the trade-mark "FEATURE LOCK" was the adoption of a trade-mark confusingly similar to appellant's trade-

mark "WED LOK" and that there would be resultant "confusion of source", trade-mark infringement and unfair competition.

Again on the question of confusion, the Court's attention is directed to the testimony of Mr. Peterson, President of Feature Ring Co., which established confusion as to the origin of ring ensembles bearing the use of the word "LOCK". This confusion involved a ring ensemble marked "DOVETAIL LOCK" which was handled by one of appellee Feature Ring Co.'s distributors. This distributor thought that this ring was one of appellee's manufacture and after it had received a notice of trade-mark infringement because of the use by a customer of said distributor of the trade-mark "DOVETAIL LOCK" the said notice was sent to appellee Feature Ring Co., demanding indemnity for the retail jeweler. In this respect Mr. Peterson testified at R. 339 as follows:

> "Now, as a matter of fact, your dealer was confused as to who manufactured Dovetail Lock, because as a matter of fact, Dovetail Lock is not of your manufacture, isn't that so?
>
> A. That is correct."

It is submitted that the record of this case establishes beyond any doubt "confusion of source" between the trade-marks "FEATURE LOCK" and "WED LOK" and as this Court of Appeals stated in the recent case of *Stork Restaurant, Inc. v. Sahati, et al.,* 166 Fed. (2d), 348 at 356:

> "We reach now what is perhaps the controlling principle in the instant case—that of 'confusion

of source', with its corollary, 'dilution of good will'. This doctrine has been adumbrated in the excerpts from some of the decisions that we have already quoted: a direct inquiry into the problem is now in order.

* * * * * * *

One's interest in a trade-mark or trade name came to be protected, therefore, not only on competing goods, but on goods so related in the market to those on which the trade-mark or trade name is used that the good or ill repute of the one type of goods is likely to be visited upon the other. Thus one's interest in a trade-mark or trade name is protected against being subjected to the hazards of another's business.' Restatement, Id., at pages 597-598.

* * * * * * *

'These cases all hold that where as here it plainly appears that there is a purpose to reap where one has not sown, to gather where one has not planted, to build upon the work and reputation of another, the use of the advertising or trade name or distinguishing mark of another, is in its nature, fraudulent and will be enjoined.'

* * * * * * *

There is no need for the appellees to appropriate the appellant's 'fanciful' or 'arbitrary' trade name. As was said by the Supreme Court of California in Eastern Columbia, Inc. v. Waldman, supra, 30 Cal. (2d) at page 270, 181 P. (2d) at page 867: 'Under these circumstances it is difficult to find any justification for permitting defendant to use those words at all in his business whether alone or in conjunction with other words. There is no commercial necessity for him to use them. They are not necessary to describe his busi-

ness or the products he sells such as there might be if they had other than a fanciful meaning with no geographic significance.'

This thought that a newcomer has an 'infinity' of other names to choose from without infringing upon a senior appropriation runs through the decisions like a leitmotiv.

In Florence Mfg. Co. v. J. C. Dowd & Co., supra, 2 Cir., 178 F. at page 75, we find a classical statement of the principle: 'It is so easy for the honest business man, who wishes to sell his goods upon their merits, to select from the entire material universe, which is before him, symbols, marks and coverings which by no possibility can cause confusion between his goods and those of competitors, that the courts look with suspicion upon one who in dressing his goods for the market, approaches so near to his successful rival that the public may fail to distinguish between them.'

And in Coca-Cola Co. v. Old Dominion Beverage Corporation supra, 4 Cir., 271 F. at page 604: 'Plaintiff's rights are limited at the most to two words. All the rest of infinity is open to defendant. It will be safe if it puts behind it the temptation to use in any fashion that which belongs to the plaintiff. It has not done so voluntarily, and compulsion must be applied.' "

In the case of *Bulova Watch Company v. Stolzberg,* 69 F. Supp. 543, the Court in discussing unfair competition and confusion of source said:

"Gradually, however, the cases have come to recognize that it is the 'unfairness' of the defend-

ant's conduct rather than the existence of 'competition' between plaintiff and defendant which forms the basis for the intervention of a court of equity. The trade-mark not only serves to designate the source of the owner's products, but also stands as a symbol of his good will and hence is an instrument for the creation and retention of custom. Schechter, F. I., The Rational Basis of Trade-Mark Protection, 40 Harvard Law Review, 813. Where the mark is strong, i.e., unique or fanciful, the courts have been more prone to grant protection from use on noncompeting goods."

Still another case that discusses the theory of confusion of source is that of *Philadelphia Storage Battery v. Mindlin,* 296 N. Y. S. 176, where the Court said:

"* * * But diversion of trade is not the only injury which may be caused by the second use. The normal potential expansion of the plaintiff's business may be forestalled. * * * His reputation may be tarnished by the use of his mark upon an inferior product. * * * A false impression of a trade connection between the parties may be created, possibly subjecting the plaintiff to liability or to the embarrassments of litigation, or causing injury to his credit and financial standing. * * *"

* * * * * * *

"The element of the possibility of confusion at source has been stressed in various decisions. The ambit of protection is constantly being widened. The adoption of 'Kodak' for cameras precludes its use on bicycles * * *. 'Rolls-Royce,'

> the name of an automobile, may not be appropriated for radio tubes * * *; 'Time' as a brand of bicycles may be restrained by the proprietor of a newspaper bearing that name * * *; 'Waterman' as a mark for razor blades may be interdicted at the suit of the fountain pen company * * *; the use of 'Dunhill' the famous brand for smokers' supplies, on shirts constitutes an infringement * * *; the same mark may not be used on liniment and soap * * *; automobiles and tires * * *; food products and oleomargarine * * *; upon electrical appliances and spark plugs * * *; upon cooking utensils and wash boilers * * *; or upon mineral oil and figs * * *." (Emphasis ours.)

It is seen by the above cases that the theory of "confusion of source" is well established, and in applying the law to the facts of the instant case where such "confusion of source" is clearly established by the record, an injunction should issue against appellees enjoining them from such unfair trade practices.

The basis and principle upon which appellant is entitled to relief is the principle of "confusion of source" with its corollary "dilution of good will".

This principle has been defined by this Court in the case of *Stork Restaurant v. Sahati,* 166 Fed. (2d) 348, as follows (quoting from page 356 of that volume):

> "We reach now what is perhaps the controlling principle in the instant case—that of 'confusion of source', with its corollary, 'dilution of good will'.

> * * * confusion of source may be defined as a misleading of the public by the imitation of 'An attractive, reputable trade-mark or trade name * * * not for the purpose of diverting trade from the person having the trade-mark or trade name of the imitator, but rather for the purpose of securing for the imitator's goods some of the good-will, advertising and sales stimulation of the trade-mark or trade name'."

It should be emphasized that the actionable confusion in the present case does not rest solely upon the proposition that the goods of the appellees may be mistaken by the public for the appellant's goods. The gravemen of this case is the likelihood, as we will show, that the public will be led to believe that in some fashion the goods of the appellees will in some way be associated or connected with that of the appellant, or is under the supervision or sponsorship of the appellant; in other words, the likelihood that the two businesses will "be regarded by prospective purchasers as associated with the source identified by the trade-mark or the trade name" (Rest. Torts, Vol. III, Sec. 730, page 596).

"The confusion of source" concept is now the accepted doctrine in this field of the law, not only generally *(Brooks Bros. v. Brooks Clothing,* in Infringement of Trade-Mark or Trade Name, 148 A.L.R. 12, 53, ff., and cases therein cited; Kahlman, Unfair Competition of Trade-Marks, Vol. II, pp. 116-121) but in California as well. (See, for example, *Eastern Columbia v. Waldman,* 30 C. (2d) 268; *Winfield v.*

Charles, 77 C. A. (2d) 64; *Jackman v. Mau,* 78 C. A. (2d) 234; *Physicians Electric Service v. Adams,* 79 C. A. (2d) 550; *Academy of Motion Picture Arts and Sciences v. Benson,* 15 C. (2d) 685.)

Thus under the doctrine of "confusion of source", the trial Court should have considered whether or not the similarity in the trade-marks "FEATURE LOCK" and "WED LOK" was such that ultimate purchasers might believe that the goods trade-marked "FEATURE LOCK" were in some fashion sponsored by the appellant or were put out under the supervision or sponsorship of the appellant and regarded by prospective purchasers as the source identified by the trade-mark "WED LOK". Also the trial Court should have considered whether or not the purpose of adopting the trade-mark "FEATURE LOCK" for the identical goods of the appellant marked "WED LOK", as well as the effect of such adoption, was not for securing for the appellees' goods some of the good will, advertising and sales stimulation of the trade-mark "WED LOK". That this is an element in considering the question of "confusion of source" is clear from the *Stork Restaurant v. Sahati case,* 166 Fed. (2d) 348. Obviously, that the adoption of "FEATURE LOCK" for the appellees' goods had that effect is evident from the record which shows that, although the appellant's business built up more or less slowly over a period of ten or more years, the appellees' goods immediately that it was offered attained forthwith wide acceptance and resulted in a tremendous amount of business. That the purpose of

the use of a somewhat similar name by the appellees and those dealing for them was actually for securing the effect of some of the good will, advertising and sales stimulation of the trade-mark "WED LOK" is further evident from the fact that in at least eight instances the retailers dealing only in the appellees' rings adopted similar trade-marks imitating the trade-mark "WED LOK". The following are those marks: "KIN LOCK", "BRIDALOK", "ETERNA LOCK", "LOVE LOCK", "RHAPSODY LOCK", "MAGNOLIA LOCK", "INVISIBLE LOCK" and "TRU LOCK". That these latter trade-marks, which were also applied to appellees' goods by the retailers, were actually "hatched" from the trade-mark "FEATURE LOCK" of the appellee, Feature Ring Co., is clear from the appellees' own testimony (R. 342), and the only evidence in the case is to the end that the "confusion of source" was the result of the appellee Feature Ring Co.'s adoption of the trade-mark "FEATURE LOCK".

Mr. Morris Jacoby (R. 446-447) testified that he is a jeweler in Portland, Oregon, has been in the jewelry business for approximately forty-three years, and that he has known the ring ensemble sold under the trade-mark "WED LOK" for a period of about ten years. He further testified that, when he first saw the mark "FEATURE LOCK" in a newspaper advertisement of a competitor, he was caused to think that the appellant, Granat Bros., were selling their rings in Portland through another dealer.

Mr. Leonard Goldblatt (R. 508-509) testified that he resided in Salem, Oregon, and had been a jeweler for thirty-three years, and that he had known the appellant, Granat Bros., since about 1916. He also testified that he has known of the use of the trade-mark "WED LOK" in connection with ring ensembles for the last twelve or fourteen years and had been selling them for the last two and one-half to three years. He further testified that when he first heard of "FEATURE LOCK" being applied to wedding ring and engagement ring ensembles, he thought it was another product of Granat Bros., appellant, put out with a different name so that Granat could open other accounts than those which were selling "WED LOK" rings.

Mr. Holly Jackson (R. 474) testified that he was a jeweler in Salem, Oregon, and had been for approximately twenty-seven years, that he had known of Granat Bros. for at least twenty years, and that he had known of wedding ring and engagement ring ensembles sold under the "WED LOK" trade-mark for about five years. He testified that when he first heard of the trade-mark "FEATURE LOCK" in connection with engagement ring ensembles he thought it was another Granat ring.

Arthur A. Navarro (R. 582-583) testified that he was a jeweler at Aurora, Illinois, and had been for approximately twenty-four years, and he had known of the Granat Bros. for fifteen years and he handled the products manufactured by Granat Bros. including "WED LOK" rings. He testified that when he first

heard of the trade-mark "FEATURE LOCK" to identify wedding-engagement ring ensembles he identified it with Granat Bros.

Benjamin B. Shapiro (R. 694-695) testified that he was a jeweler in Beverly Hills, California, and that he had been for some thirty-seven years, that he had known of Granat Bros. for more than twenty-four years, and that when he first heard of the name or mark "FEATURE LOCK" used in connection with a ring ensemble he identified it with Granat's products but later was confused as to whose product it was.

From the foregoing testimony, it certainly would appear that the confusion of source element of trade-mark infringement and unfair competition has been established because those even in the business of handling wedding rings and wedding-engagement rings when they first heard of the mark "FEATURE LOCK" forthwith identified it with the appellant, and, therefore, in some way associated or connected that product with the appellant or that the product in some fashion was put out under the supervision or sponsorship of the appellant and, therefore, the products marked "FEATURE LOCK" and "WED LOK" were associated with the same source.

The second element, which is important and upon which appellant is entitled to relief, is that of "dilution" and "nibbling away" of the appellant's property right in the mark "WED LOK". It has been abundantly established by the authorities that the owner of a trade-mark has a property right therein

which he is entitled to protect against "dilution" and "nibbling away" by imitators.

This Court, in the *Stork Restaurant v. Sahati case,* stated:

> " 'Common law trade-marks, and the right to their exclusive use, are, of course, to be classed among property rights (*In re Trade-Mark Cases,* 100 U.S. 82, 92, 93, 25 L. Ed. 550, 551); but only in the sense that a man's right to the continued enjoyment of his trade reputation and the good will that flows from it, free from unwarranted interference by others, is a property right, for the protection of which a trade-mark is an instrumentality. * * *' "

Obviously the effect of the use by "FEATURE LOCK" by the appellee, Feature Ring Co., and the eight other lock trade-marks "hatched" therefrom has been to "whittle away" and "nibble away" the good will of appellant and the great diminution of the value of its trade-mark, and a separation of its trade-mark from its good will.

In the words of a leading authority on this subject, the real injury is the gradual "whittling away" or dispersion of the identity and hold upon the public mind of the mark or name by its use on other goods. Authority has gone so far as to suggest that where the danger of dilution exists, the Court should "not embark upon an obviously irrelevant inquiry into the possibility of confusion" (meaning confusion between ultimate purchasers or the palming off of goods).

The California Courts also have recognized that "the benefits of an exclusive trade-mark are to create and preserve a favorable reputation, *to stimulate the sale of a product,* and to distinguish it from similar competing products." *Sun Maid Raisin Growers v. Mosesian,* 84 C. A. 485; see, also, *Hall v. Holstrom,* 106 C. A. 563. And while most of the California cases deal with personal names, geographical names and other designations which are relatively "weak", the Court granted injunctive relief upon the theory that the plaintiff had an exclusive property right in such name and that the use of a similar name by the defendant resulted in damage to the plaintiff's "standing and reputation" and to the "market ability of the plaintiff's business".

Very obviously the significance and value of appellant's trade-mark "WED LOK" as an advertising device has been seriously impaired by the adoption and use of "FEATURE LOCK" by the appellees and the subsequent "hatching" out therefrom and labeling of appellees' goods with the other eight names, such as "KIN LOCK", "BRIDALOK", "ETERNA LOCK", etc., and that unless injunctive relief is granted to preserve the identity and singularity of the appellant's trade-mark, appellant may one day find itself literally hemmed in by "FEATURE LOCK", "TRU-LOCK", etc., and, as a result the value of its trade designation "WED LOK" and its great investment in it may be largely destroyed if it has not already been hemmed in by such trademarks and its good will appreciably diminished.

Thus we contend that the appellant has been irreparably damaged and will continue to be unless it can obtain relief in this Court by way of injunction.

Appellant's trade-mark is being whittled away and diluted by the unfair competition of appellees.

There can be no question but that appellant has established an enviable good will and reputation in the industry for the quality of its merchandise and in the trade-mark "WED LOK". This trade-mark has been continuously used by appellant since 1936 and thousands and thousands of dollars have been spent in advertising and establishing this mark in the trade and with the public.

Appellee, Feature Ring Co., entered this field of manufacturing and selling interlocking rings at a recent date (May 1948, R. 363) and had knowledge at the time of its adoption of its trade-mark "FEATURE LOCK" of appellant's trade-mark "WED LOK" (R. 284). Of all the names appellee, Feature Ring Co., could have selected as a trade-mark for its product, it chose one as close as it possibly could to appellant's trade-mark, no doubt, in the hopes that it could "get away with it" and still benefit from the good will of its successful competitor.

The appellee, Feature Ring Co., was not content with its adoption and use of a single infringing trade-mark on its own behalf, but encouraged its distributors to use the word "LOCK" in connection with the sale of its product by said distributors. These other names employed by the distributors and "hatched"

from the "FEATURE LOCK" trade-mark (R. 357) are: "KIN LOCK"
"BRIDALOK"
"ETERNA LOCK"
"LOVE LOCK"
"RHAPSODY LOCK"
"MAGNOLIA LOCK"
"INVISIBLE LOCK"
"TRU LOCK".

The adoption of these additional names has resulted in a "hemming in" of appellant with confusingly similar names on identical goods. This "hemming in" is actionable as unfair competition as was said in *Stork Restaurant, Inc. v. Marcus et al.,* 36 Fed. Supp. 90-94:

> "* * * In fact, reflection clarifies the possible, perhaps probable effects of licensing such an usurpation of reputation as here confronts me. Upon the strength of a single, if sustained, precedent the plaintiff could be literally 'hemmed in' by 'Stork Clubs', until the public was so surfeited with the same that the mere mention of the name would provoke contrary reactions."

We find that there has been a constant nibbling or whittling away and dilution of appellant's rights. This nibbling, whittling away and dilution is also a violation of appellant's trade-mark and property rights and constitutes unfair competition. This doctrine of unfair competition was discussed by this Court in the now celebrated case of *Stork Restaurant, Inc. v. Sahati,* 166 Fed. (2d) 348, at 356, where this Court said:

"We reach now what is perhaps the controlling principle in the instant case—that of *'confusion of source'*, with its corollary, *'dilution of good-will'*. This doctrine has been adumbrated in the excerpts from some of the decisions that we have already quoted: a direct inquiry into the problem is now in order."

* * * * * * *

" 'These cases all hold that where as here it plainly appears that there is a purpose to reap where one has not sown, to gather where one has not planted, to build upon the work and reputation of another, the use of the advertising or trade name or distinguishing mark of another, is in its nature, fraudulent and will be enjoined.'

In Cleo Syrup Corporation v. Coca-Cola Co., 8 Cir., 139 F. (2d) 416, 417, 150 A.L.R. 1056, certiorari denied, 321 U.S. 781, 782, 64 S. Ct. 638, 88 L. Ed. 1074, the court declared that 'There is no merit in the contention that a court of equity will not afford protection to the plaintiff's trademark or prevent its good will from being *nibbled away* by unfair competitors.' "

In *Lady Esther v. Lady Esther Corset Shoppe* (1943), 317 Ill. App. 451, 46 N. E. (2d) 165, the Court said:

"In the instant case we think it clear that the public might be deceived into thinking there was some connection between the defendant and the plaintiff companies. *And the good-will of plaintiff, which it had built up at great expense over a period of years, would be whittled away. Courts of equity ought not to be so feeble as to be unable to prevent this.*" (Emphasis ours.)

Value of the word "LOCK" or "LOK" in appellant's and appellee's trade-mark was established by one of appellee's own witnesses.

During the course of this case, appellee, Feature Ring Co., called as a witness a wholesale distributor of jewelry products, Maurice R. Stamper, who emphasized the value of the word "LOCK" in the trade-mark adopted by his company, Julius Dreyfus, Inc., in the trade-mark "ETERNA LOCK", under which it sold rings manufactured by appellee, Feature Ring Co. Mr. Stamper stated that if the word "LOCK" were deleted from the trade-mark, it would destroy the distinctiveness of the trade-mark. In his deposition, Exhibit 39, at R. 80, he stated the following:

> "Q. Would you say that the word 'Lock' was a dominating feature of your trade-mark 'Eterna Lock'?
>
> A. I would say it would be very important because to call it 'Eterna Diamond Rings' is no different than 5000 other trade name diamond rings on the market, and in order to describe what the feature was that we were selling the Lock had to be added.
>
> Q. There was nothing to prevent you at the time other than your own merchandising course of advertising the same product as 'Feature Lock', was there?
>
> A. No.
>
> Q. I gather from your testimony, then, that the word 'Lock' as part of your trade-mark was a very important thing in that trade-mark?
>
> A. I would say yes."

The implication from the above testimony is that unless this witness were allowed to employ his trade-

mark "ETERNA LOCK", said trade-mark would be valueless. In other words, if he could not ride on the coattails of appellant and trade on the reputation established by the appellant in the word "LOCK", that it would be a serious blow to a business. In other words, trading on appellant's good will and "reaping" where he had not "sown" was necessary to sell the products of appellees.

THE APPELLANT IS ENTITLED TO AN INJUNCTION UPON THE THEORY OF UNFAIR COMPETITION.

What constitutes "unfair competition"—in general.

In drawing the line between commercial practices which will be enjoined as "unfair" and those which will not, the Courts have not always agreed. This lack of harmony in the case law has resulted in large measure from the fact that "the scope of liability in this field is constantly expanding. This is due partly to the flexibility and breadth of equitable relief and partly to changing methods of business and changing standards of commercial morality." *Rest., Torts,* vol. 3, p. 538.

Thus, there appears to be less conflict among the modern cases than there is between them and the older decisions. And this has led the Courts to place greater emphasis upon the more recent cases. Hence the oft-quoted remark of the Seventh Circuit Court of Appeals in *Philco Corp. v. Phillips Mfg. Co.,* 133 Fed. (2d) 663, at p. 672, that "a 1905 restatement of State common law rules governing the use of trade-marks

may not furnish an adequate answer to the trade-mark problems in 1943."

While the law in this field is by no means static,[1] certain principles have emerged as to which there can be no dispute. In postulating these general rules and definitions, we find it convenient to draw upon the Restatement of Torts.[2]

A technical trade-mark, which must be affixed to goods, and as to which exclusive rights may be created merely by prior adoption and use, as well as a trade name or insignia, is entitled to protection when it has become known in the market as "the name for goods or services coming from or through a particular source or the name for a particular business." *Rest., Torts,* vol. 3, p. 559.

Thus, a trade name is defined as "any designation which (a) is adopted and used by a person to denominate goods which he markets or services which he renders or a business which he conducts, or has come

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[1]See, *Schechter, the Rational Basis of Trade-Mark Protection* (1927), 40 Harv. L. Rev. 813; *Schechter, Fog and Fiction in Trade-Mark Protection* (1936), 36 Col. L. Rev. 60; *Chafee, Unfair Competition* (1940), 53 Harv. L. Rev. 1289; *Handler and Pickett, Trade-Marks and Trade Names—An Analysis and Synthesis* (1930), 30 Col. L. Rev. 168.

[2]In this we follow the example set by Judge Yankwich in *Brooks Bros. v. Brooks Clothing of California,* supra, who confessed his "bewilderment resulting from an attempt to reconcile the large number of state decisions, or even the large number by federal district and circuit court decisions upon any one topic pertaining to this subject". (p. 448.)

It is to be noted, also, that the *Restatement* was quoted extensively by the Supreme Court of California in the recent case of *Eastern-Columbia, Inc. v. Waldman,* decided June 13, 1947, 30 C. (2d) 268, 273-274.

to be so used by others, and (b) through its association with such goods, services or business, has acquired a special significance as the name thereof * * *" *Rest., Torts,* vol. 3, sec. 716, p. 558. The "designation" may be either a name or an insignia.

The term "special significance" embraces the concept of "secondary meaning", which is the term commonly used in the case law. *Rest., Torts,* vol. 3, p. 560. Actually, the phrase "secondary meaning" does not mean "a subordinate and rare significance"; it means, rather, "a subsequent significance added to the previous meaning of the designation and becoming in the market its usual and primary significance." *Rest., Torts,* vol. 3, p. 560. As a California Court has said, the secondary meaning "submerges the primary meaning * * * and the new meaning survives as the identification, in the market, of a product and its source." *Winfield v. Charles,* 77 C. A. (2d) 64. See also, *Eastern-Columbia Inc. v. Waldman,* 30 C. (2d) 268, note 6; *Callman,* supra, p. 1012 ff. Obviously, the more distinctive the designation, the more readily will it acquire a special significance.

As to the elements of infringement, "One infringes another's trade-mark if (a) without a privilege to do so, he uses in his business, in the manner of a trademark or trade name, a designation which is identical with or confusingly similar to the other's trade-mark though he does not use the designation for the purpose of deception, and (b) the other's interest in his trade name is protected with reference to (i) the goods, services or business in connection with which

the actor uses his designation, and (ii) the markets in which the actor uses his designation". *Rest., Torts,* vol. 3, sec. 717, p. 562.

As the Court said in the *Brooks Bros. case* (60 F.S. 442), at p. 450, the liability thus imposed protects " 'a person against harm to his business which the actor *might* cause by misleading prospective purchasers into identifying the actor's goods, services or *business* with those of the other. The ultimate issue in infringement cases is the *likelihood* that prospective purchasers will be so misled' " (emphasis ours). See also, *Rest., Torts,* vol. 3, p. 567.

It should emphasized that actionable confusion in the present case is not limited to the proposition that the public is apt to mistake the appellees' goods for the appellant's goods. The gravamen of this action is the likelihood, as we shall show, that the public will be led to believe that the appellees' goods are in some way associated or connected with that of the appellant, or is under the supervision or sponsorship of the appellant—in other words, the likelihood that the two businesses will "be regarded by prospective purchasers as associated with the *source* identified by the trade-mark or trade name" *(Rest., Torts,* vol. 3, sec. 730, p. 596; emphasis ours).

The "confusion of source" concept is now the accepted doctrine in this field of the law, not only generally *(Brooks Bros. v. Brooks Clothing of California,* 60 F. S. 422; Anno.—Infringement of Trademark or Tradename, 148 A. L. R. 12, 53 ff., and cases therein

cited; *Callman,* supra, vol. 2, pp. 1116-1121), but in California as well. See, for example, *Eastern-Columbia, Inc. v. Waldman,* 30 C. (2d) 268, note 6; *Winfield v. Charles,* 77 C. A. (2d) 64; *Jackman v. Mau,* 78 C. A. (2d) 234; *Physicians Electric Service Corp. v. Adams,* 79 C. A. (2d) 550; *Academy of Motion Picture Arts & Sciences v. Benson* (1940), 15 C. (2d) 685; *Law v. Crist* (1940), 41 C. A. (2d) 862; *Carolina Pines, Inc. v. Catalina Pines* (1932), 128 C. A. 84; *Evans v. Shockley* (1922), 58 C. A. 427; *Wood v. Peffer* (1942), 55 C. A. (2d) 116.

The particular elements embodied in the above definition of infringement will be discussed separately. It should be borne in mind, however, that they are all mere facets of the central issue of confusion. Thus, whether there is a likelihood of confusion depends in part upon (1) the similarity between the appellant's trade-mark and that of the appellees; (2) the nature of the businesses involved; and (3) the geographical relationship between the appellant's business activities and those of the appellees.

In addition, the ultimate issue of confusion is affected by two additional considerations which have an important bearing upon the present case, namely, (1) the fact that the appellant's trade-mark is distinctive, and (2) the fact that they were appropriated by the appellees with knowledge that it was already being used in connection with the appellant's goods and business. These factors will likewise be treated separately, although they pervade the entire case.

The appellant's trade name is distinctive and is, therefore, entitled to the utmost protection.

It requires no argument to show that the appellant's trade-mark is unique, arbitrary, and fanciful. The trial Court so found (R. 45). The test, of course, is not whether the words "WED LOK" or "LOK" are to be found in the dictionary, but whether the dictionary gives them the meaning they have when applied to the appellant's ring ensembles. As stated in *Philadelphia Storage Battery Co. v. Mindlin* (1937), 163 Misc. 52, 296 N.Y.S. 176, 181-182.

> "The fear is sometimes expressed that the extension of protection may foster monopoly, not merely of language but of trade. The fear is groundless. He who coins a trade symbol adds rather than detracts from the language. Even when a term in a dictionary is used in an arbitrary manner, the language is not impoverished. The term may still be used in its accepted sense; what equity prevents is the appropriation of the new layers of meaning that have been added by the plaintiff. The rights of the first user can be sustained to the extent that they do not unduly handicap others in the honest conduct of their business. New competition and enterprise 'must not be throttled, but the late comer should be compelled to rely upon his own ingenuity, rather than misrepresentation and misappropriation for the creation of his market. This much at least is demanded by the most elementary notions of honesty.' Handler, Unfair Competition, 21 Iowa Law Review, 175, 186. Blatant imitation should not be recognized by the judicial condonation of practices which violate the fundamental precepts of fair business dealing."

It is obvious that the "more distinctive the trade-mark is, the greater its influence in stimulating sales, its hold on the memory of purchasers and the likelihood of associating similar designations on other goods with the same source." *Rest., Torts,* vol. 3, p. 602. Distinctive designations have thus come to be regarded as "strong" marks or names, and non-distinctive designations as "weak". And common generic words, such as "Ivory" (soap) or "Blue Goose" (fruit), have often been recognized as "strong". See *Callman,* supra, p. 1226 ff.

Realizing that distinctive designations, unless closely guarded, will lose their character and their advertising value, the Courts have been careful to protect them against gradual encroachment. As said in *Arrow Distilleries v. Globe Brewing Co.* (1941), 4 Cir., 117 F. (2d) 347, 351:

> "* * * the rule that coined or fanciful marks or names should be given a much broader degree of protection than words in common use is sound, for it recognizes not only the orthodox basis of the law of trade-marks that the sale of the goods of one manufacturer or vendor as those of another should be prevented, but also the fact that in modern business the trade-mark performs the added function of an advertising device, whose value may be injured or destroyed unless protected by the courts. Schechter, The Rational Basis of Trade Mark Protection, 40 Harvard Law Review 813; Restatement of Torts, sec. 715 (b)."

In *Lady Esther v. Lady Esther Corset Shoppe* (1943), 317 Ill. App. 451, 46 N. E. (2d) 165, 148 A.

L. R. 6, which involved the distinctive name "Lady Esther" as applied to the plaintiff's cosmetics, the Court said (p. 11):

> "In the instant case we think it clear that the public might be deceived into thinking there was some connection between the defendant and the plaintiff companies. *And the good-will of plaintiff, which it had built up at great expense over a period of years, would be whittled away. Courts of equity ought not to be so feeble as to be unable to prevent this"* (emphasis ours).

As the Court observed in *Cleo Syrup Corp. v. Coca-Cola Co.* (1943), 8 Cir., 139 F. (2d) 416, 417, 150 A. L. R. 1056, cert. den. 321 U.S. 781, 64 S. Ct. 638, 88 L. Ed. 1074:

> "* * * There is no merit in the contention that a court of equity will not afford protection to the plaintiff's trademark *or prevent its good will from being nibbled away by unfair competitors"* (emphasis ours).

We need not multiply the authorities, except to point out that the California Courts are in accord. For example, in *Katschinski v. Keller* (1920), 49 C. A. 406, the word "Philadelphia" was held to be "purely arbitrary and fanciful" as applied to a retail shoe store; in *Hall v. Holstrom* (1930), 106 C. A. 563, the name "The White Spot", as applied to a restaurant, was found by the trial Court to be "purely and entirely fanciful and artificial", and such finding was not questioned on appeal; and finally, in the recent case of *Eastern-Columbia, Inc. v. Waldman,* 30 C.

(2d) 268, note 6, the words "Eastern-Columbia" were found to have acquired a "fanciful" meaning in reference to a chain store.

Not only is the appellant's trade-mark intrinsically "strong", but its natural attributes as a trade-mark have been greatly enhanced by the fact that the appellant has spent thousands and thousands of dollars in promoting and publicizing it throughout the United States, as a result of which it has acquired a meaning and an advertising appeal which is indeed unique. As said in *Callman,* supra, at p. 1226, "a mark can be distinctive either because it is unique, that is, distinctive in itself, because it has been the subject of wide and intensive advertisement, or because of a combination of both." Here we have a combination of both.

In short, the appellant's goods and business are known all over the United States (R. 762), and the good will which it has thus established, over a long period of time and at great expense, is of great worth. The appellant is entitled to protection from the erosive "borrowing" by others of its valuable trade designation.

Although the trial Court found, in effect, as we have seen, that the appellant's trade-mark is valid, the Court refused to find that a secondary meaning attached thereto. It thus appears that the Court, in resolving the issue of confusion, did not give sufficient weight to the fact that the appellant's trade-mark was entitled to the fullest protection against "whittling away" or "nibbling away", and that it

did not fully recognize, as other Courts have done, the familiar adage that the camel that gets his head under the flap will soon steal the whole tent.

The appellant's trade-mark is entitled to protection.

Thus far we have shown that the appellant's trade-mark, according to the trial Court's own findings (R. 40), has been "widely and very extensively advertised throughout the United States from the year 1936 to the present, excluding the war years of 1942, 1943, 1944 and 1945; and is a distinctive and valid trade-mark (R. 41). It is also established by the record that there is a striking and unmistakable similarity between the appellant's distinctive trade-mark and the designation employed by the appellees; and that the failure of the appellees to explain or justify their wilful appropriation of the appellant's valuable and distinctive trade designations indicates that their purpose was to trade upon the appellant's good will and reputation by inducing the public to believe that there was some connection or association between their goods or business and that of the appellant.

Under such circumstances it would seem almost self-evident that there is a likelihood, if not a certainty, of confusion and that the appellant, as a matter of law, is entitled to an injunction. When we consider the further fact that the appellees' business was within the identical class as the appellant's, there would seem to be no need to discuss the question of whether the appellant is entitled to injunctive relief in reference to the appellees' business—particularly,

since the appellees themselves, by their deliberate appropriation of a confusingly similar trade-mark with the appellant's trade-mark, presumably believed that their business was sufficiently related to the appellant's that their use of the latter's trade-mark would redound to their commercial advantage. If they did not so believe, then why did they adopt the name "FEATURE LOCK" for their products? Why did they not choose some other name out of the "infinity" which was at their disposal?

This subtle form (close approach to same mark) of infringement developed when trade-marks became not simply indicia of source to purchasers who cared about source, but also powerful advertising and sale factors. An attractive, reputable trade-mark could then be imitated not only for the purpose of diverting trade from the person having the trade-mark to the imitator, but also for the purpose of securing for the imitator's goods some of the good will, advertising and sales stimulation of the trade-mark or trade name. And where, for example, a customer, as a result of such "sales stimulation", has an unsatisfactory experience with the imitator, he may hold the owner of the trade-mark responsible therefor. If he has previously dealt with such owner, or purchased his goods, he may transfer his allegiance to some other business or commodity; or, if he has not previously dealt with the owner of the trade-mark, he may decline in the future to do so. What's more, he may induce others to act in the same way. Hence, the Court will protect the owner from the risks involved where his trade desig-

nation is used in another business over which he has no control.

The trial Court here refused to find infringement and unfair competition because of lack of actual confusion in ultimate customers. This is error because in the modern view there may be a likelihood of confusion *even though there is no actual confusion.* This view is perhaps best expressed in the classic and much quoted statement of Judge Learned Hand in *Yale Electric Corporation v. Robertson* (1928), 2 Cir., 26 F. (2d) 972, 973, as follows:

> "* * * The law of unfair trade comes down very nearly to this—as judges have repeated again and again—that one merchant shall not divert customers from another by representing what he sells as emanating from the second. This has been, and perhaps even more now is, the whole Law and Prophets on the subject, though it assumes many guises. Therefore it was at first a debatable point, whether a merchant's good will, indicated by his mark, could extend beyond such goods as he sold. How could he lose bargains which he had no means to fill? What harm did it do a chewing gum maker to have an ironmonger use his trade-mark? The law often ignores the nicer sensibilities.
>
> *"However, it has of recent years been recognized that a merchant may have a sufficient economic interest in the use of his mark outside the field of his own exploitation to justify interposition by a court. His mark is his authentic seal; by it he vouches for the goods which bear it; it carries his name for good or ill. If another uses it, he borrows the owner's reputation, whose*

quality no longer lies within his own control. This is an injury, even though the borrower does not tarnish it, or divert any sales by its use; for a reputation, like a face, is the symbol of its possessor and creator, and another can use it only as a mask. And so it has come to be recognized that, unless the borrower's use is so foreign to the owner's as to insure against any identification of the two, it is unlawful.'' (Citing cases; emphasis ours.)

As a matter of fact, the authorities even go so far as to hold that actual competition between the parties is unnecessary to find trade-mark infringement and unfair competition.

The cases in support of this view are legion. The "rule declared by our Ninth Circuit Court of Appeals is that competition is not necessary". *Brooks Bros. v. Brooks Clothing of California,* 60 F. S. 442, at p. 451. See also, *Del Monte Special Food Co. v. California Packing Corp.* (1929), 9 Cir., 34 F. (2d) 774; *Horlick's Malted Milk Corp. v. Horluck's, Inc.* (1932), 9 Cir., 59 F. (2d) 13; *Phillips v. The Governor & Co.* (1935), 9 Cir., 79 F. (2d) 971. This is likewise the majority rule. See Anno.—Actual competition as necessary element of trade-mark infringement or unfair competition, 148 A. L. R. 12, 22.

In addition to the above authorities, we need only make brief reference to the California decisions. In *Jackman v. Mau,* 78 C. A. (2d) 234, in which the plaintiff was a wholesaler and the defendant a retailer, and the parties were admittedly not in compe-

tition with each other, the Court rejected the contention that there could be no "unfair competition" in the absence of competition. The Court said:

> "* * * While it is true that most of the cases dealing with unfair competition are concerned with instances in which the respective parties are engaged in business directly competitive, nevertheless, as said in *Academy of Motion Picture Arts & Sciences v. Benson,* supra, at page 689: 'But we perceive no distinction which, as a matter of law, should be made because of the fact that the plaintiff and defendant are engaged in non-competing businesses.' The true test is—has the defendant 'adopted a name which *prima facie* is broad enough in its concept to be mistaken by the ordinary unsuspecting person for the institution created by the incorporators of the plaintiff.' "

In the *Academy* case, 15 C. (2d) 685, which was decided by the Supreme Court of California, the plaintiff was a non-profit corporation organized for the purpose of advancing the art of motion pictures by conferring awards of merit, conducting research, and the like, whereas the defendant operated a school of dramatics. The opinion of the Court specifically points out that the "businesses of the parties are not directly competitive", and that by *"the use of the name Hollywood Motion Picture Academy the defendant does not take away from the plaintiff and draw to* herself any business which the plaintiff otherwise would receive" (pp. 688-689, emphasis ours). Nevertheless, the Court held that upon the facts alleged in the complaint the plaintiff was entitled to an injunction "in order to

prevent confusion with the institution or society represented by the plaintiff" (p. 691); and the judgment of the trial Court sustaining a demurrer to the complaint was reversed.

Likewise, in *Law v. Crist,* 41 C.A. (2d) 862, in which both parties were non-profit organizations engaged in the teaching and advancement of "theosophy", it was held that the plaintiff was entitled to an injunction against the use of its name by the defendant, despite the fact that the parties were not competing with each other for profit. See also, *Wood v. Peffer,* 21 C. 448; *Hooper v. Stone* (1921), 54 C.A. 668.

Not only is competition unnecessary, but a review of the pertinent case law discloses that the scope of protection—business-wise and commodity-wise—which the Courts have accorded the owner of a trade name or insignia has continuously been expanding. Thus the Courts have come to recognize that under modern methods of doing business, in which advertising plays a vital role, there is real danger that a distinctive name or insignia will, unless protected, become associated in the public mind not only with other goods or businesses of the same kind and class, but even with goods or businesses of wholly different kinds and classes. "The issue in each case is whether the goods, services, or businesses of the actor and of the other are sufficiently related so that the alleged infringement would subject the good will and reputation of the other's trade-mark or trade name to the hazards of the actor's business". *Rest., Torts,* vol. 3, p. 599.

In *Yale Electric Corporation v. Robertson,* 26 F. (2d) 972, the counter-claimant was a manufacturer of locks and the plaintiff was a manufacturer of flashlights and batteries. The question, as stated by the Court, was "whether, in view of the fact that it makes no flashlights or batteries, it (the counter-claimant) may complain of the plaintiff's use of its name". The Court's answer to that question, which has already been quoted above, has served as a guide to many other Courts. Quoting again the rule of that case (p. 973):

> "* * * And so it has come to be recognized that, unless the borrower's use is so foreign to the owner's as to insure against any identification of the two, it is unlawful."

In *L. E. Waterman Co. v. Gordon* (1934), 2 Cir. 72 F. (2d) 272, the plaintiff was a manufacturer of fountain pens and similar articles under the name "Waterman", and the defendant was engaged in selling drugs and cosmetics. The defendant commenced to sell razor blades under the name "Waterman", but was enjoined from making further sales. The Court, again speaking through Judge Learned Hand, observed that (p. 273):

> "It is now well settled in this country that a trade-mark protects the owner against not only its use upon the articles to which he has applied it, but upon such other goods as might naturally be supposed to come from him. (Citing cases.) There is indeed a limit; the goods on which the supposed infringer puts the mark may be too remote from any that the owner would be likely

to make or sell. It would be hard, for example, for the seller of a steam shovel to find ground for complaint in the use of his trade-mark on a lipstick. But no such difficulty arises here; razor blades are sold very generally by others than razor blade makers, and might well be added to the repertory of a pen maker. Certainly when the infringement is so wanton, there is no reason to look nicely at the plaintiff's proofs in this regard. On the merits there can therefore be no question that the judge was right."

In *Wall v. Rolls-Royce of America, Inc.,* 4 F. (2d) 333, the plaintiff, Rolls-Royce of America, was a corporation engaged in the business of making and selling automobiles, airplanes, and parts thereof, and its name had "become associated all over the world with the excellence of its product". The defendant, Wall, was engaged in the business of selling radio tubes through the mails, labelled "Rolls-Royce"; and he advertised his business as the "Rolls-Royce Tube Company". In granting an injunction, the Court said (p. 334):

"* * * It is true those companies made automobiles and aeroplanes, and Wall sold radio tubes, and no one could think, when he bought a radio tube, he was buying an automobile or an aeroplane. But that is not the test and gist of this case. Electricity is one of the vital elements in automobile and aeroplane construction, and, having built up a trade-name and fame in two articles of which electrical appliances were all important factors, what would more naturally come to the mind of a man with a radio tube in his receiving set, on which was the name 'Rolls-

> Royce', with nothing else to indicate its origin, than for him to suppose that the Rolls-Royce Company had extended its high grade of electric product to the new, electric-using radio art as well. And if this Rolls-Royce radio tube proved unsatisfactory, it would sow in his mind at once an undermining and distrust of the excellence of product which the words 'Rolls-Royce' had hitherto stood for."

In *Dunhill of London, Inc. v. Dunhill Shirt Shop, Inc.* (1929), D.C., S.D. N.Y., 3 F. Supp. 487, the plaintiff was engaged in the business of selling pipes and other smokers' supplies, and the defendant operated a men's haberdashery shop. In granting an injunction, the Court, relying upon the *Rolls-Royce* and *Yale Electric* cases, supra, made short shrift of the matter, saying (p. 487), "It is no answer that the defendant sells shirts, and the plaintiff, smokers' requisites."

In *Kroll Bros. v. Rolls-Royce* (1942), C.C.P.A., 126 F. (2d) 495, the appellant was engaged in the business of manufacturing baby carriages and gocarts, and the appellee was a manufacturer of automobiles, and parts thereof, and airplane engines, under the name "Rolls-Royce". The Court affirmed a decision of the Commissioner of Patents denying the appellant the right to register the trademark "Krolls-Royce", upon the ground that "confusion as to origin of appellant's goods would be probable" (p. 498).

In *Cartier, Inc. v. Parfums Blanchard, Inc.* (1941), 32 N.Y.S. (2d) 15, the plaintiff was engaged in the jewelry business under the name "Cartier", but it

sold, also, such articles as lipstick containers and vanities. The defendant was in the perfumery business under the name "Charties". A temporary injunction was granted in order to protect the plaintiff and the public "in their right to fair treatment" (p. 16).

In *Socony-Vacuum Oil Co., Inc. v. Lafariere,* 48 N.Y.S. (2d) 421, the plaintiff was engaged in the business of selling fuel oil under the name "Standard Oil"; and, in addition, it furnished engineering advice regarding the operation of oil burners. It did not, however, repair or service such burners. The defendant was engaged in the business of repairing and servicing oil burners, under the name "Standard Oil Burner Service". In issuing a temporary injunction, the Court applied the settled rule that (p. 422):

> "Plaintiff * * * is entitled to be protected, not only from direct competition, but from any injury which might result to it from deception to the public through the unauthorized use of its trade-name, or a trade-name which would lead the public to believe that it was in some way connected with plaintiff."

In *Lady Esther, Limited v. Flanzbaum* (1942) D.C. R.I., 44 F. Supp. 666, the plaintiff was engaged in the business of selling cosmetics under the name "Lady Esther", and the defendant operated a retail store under the name "Lady Esther Shoe Store", selling ladies' shoes and stockings. The Court held that the defendant's conduct constituted unfair competition, and granted an injunction.

In *Time, Inc., v. Barshay* (1939), D. C. S. D. N.Y. 27 F. Supp. 870, the plaintiff was the publisher of

"Time" magazine, and the producer of radio broadcasts and motion pictures under the title "The March of Time". The defendant was engaged in the business of reproducing and selling phonograph records under the name "The Voice of Time". An injunction was granted upon the theory of unfair competition, as well as for trademark infringement.

In *Golenpaul v. Rosett* (1940), 18 N.Y. S. 889, the plaintiffs were owners of the well-known radio program "Information Please", and the defendants were about to publish a magazine under the same name. The threatened publication was enjoined by the Court, with the observation that (pp. 890-891):

> "In earlier days it doubtless would have been held that a magazine is in competition with only another magazine and that, therefore, the use by one person of two words so commonplace as 'information' and 'please' to designate either a book or a moving picture or a verbal program carried over the air would not prevent another person from using the same words as the title of a magazine. At the present time, however, the law of 'Unfair Competition' lays stress upon the element of unfairness rather than upon the element of competition and recognizes that where any name or mark or symbol, even though consisting of commonplace words of the English language, has come to signify in the public mind the product or business of a particular individual or group of individuals, such name or mark or symbol cannot be used by another individual or group of individuals, in such way as to lead the public to believe that the product or business of the latter is the product or business of the former. Illustrations of that rule are numerous." (Citing cases.)

In *Esquire, Inc. v. Esquire Bar* (1941), D.C.S.D. Fla., 37 F. Supp. 875, the plaintiff was publisher of the magazine "Esquire", and the defendant operated "an elaborate and decorative establishment" in Miami, Florida, selling goods, beverages, wines and liquors. The Court enjoined the defendant from infringing upon the plaintiff's various trade-marks and from using the name "Esquire" in any manner whatever. Upon the theory of unfair competition, the Court found that (p. 876):

> "* * * the defendant's use of plaintiff's name 'Esquire' is calculated to, and does, cause the public (not otherwise fully informed) to believe there is some connection between the two, either that the plaintiff owns or controls the business of the defendant, or sponsors it, or has given leave to conduct the business under some contract, and that the defendant's business has the approval of plaintiff, or that the defendant's business is in some manner related to the plaintiff's business, Esquire, Inc., and thereby constitutes unfair competition in violation of plaintiff's rights."

In *Great Atlantic & Pacific Tea Co. v. A. & P. Radio Stores* (1937), D.C., E.D. Pa., 20 F. Supp. 703, the plaintiff, owner of a nationally known chain of grocery stores, obtained an injunction restraining the defendant from using the letters "A. & P." in reference to a retail store dealing in new and used radios, washing machines, and electric refrigerators.

Similarly, in *Great Atlantic & Pacific Tea Co. v. A. & P. Cleaners & Dyers* (1934), D.C., W.D. Pa., 10 F. Supp. 450, the same plaintiff was granted in-

junctive relief against the operator of a cleaning and dyeing establishment.

In *Bulova Watch Co. v. Stolzberg* (1947), D.C., Mass., 69 F. Supp. 543, the Court held that (p. 547):

> "* * * Watches and shoes, while non-competing, are not so remote as to foreclose the possibility that they come from the same source. Defendant, by using the trade-mark on low price shoes, stands to injure plaintiff's reputation and dilute the quality of his trade-mark. Defendant has little cause to complain since he has been riding the coattails of the plaintiff's good will, and he had available to him a wide range of choice to name his products."

In *Philadelphia Storage Battery v. Mindlin,* 296 N.Y.S. 176, the plaintiff was the manufacturer of radio sets, storage batteries, and similar products under the well-known brand "Philco", and the defendant was engaged in the business of selling razor blades under the same name. The plaintiff had never made razor blades and there was no evidence that it ever intended to do so. The Court, nevertheless, issued an injunction, saying (pp. 178-180):

> "* * * But diversion of trade is not the only injury which may be caused by the second use. The normal potential expansion of the plaintiff's business may be forestalled. * * * His reputation may be tarnished by the use of his mark upon an inferior product. * * * A false impression of a trade connection between the parties may be created, possibly subjecting the plaintiff to liability or to the embarrassment of litigation, or causing injury to his credit and financial standing. * * *"

* * * * * * *

"The element of the possibility of confusion at source has been stressed in various decisions. The ambit of protection is constantly being widened. The adoption of 'Kodak' for cameras precludes its use on bicycles * * *; 'Rolls-Royce', the name of an automobile, may not be appropriated for radio tubes * * *; 'Waterman' as a mark for razor blades may be interdicted at the suit of the fountain pen company * * *; the use of 'Dunhill' the famous brand for smokers' supplies, on shirts constitutes an infringement * * *; the same mark may not be used on liniment and soap * * *; automobiles and tires * * *; food products and oleomargarine * * *; upon electrical appliances and spark plugs * * *; upon cooking utensils and wash boilers * * *; or upon mineral oil and figs * * *." (Emphasis ours).

The above cases* indicate the extent to which the Courts have gone in granting injunctive relief even though the defendant was engaged in an entirely different kind or class of business. As far as we have discovered, the California Courts have not yet been presented a case in which the goods or businesses involved were as different in nature as these which have confronted other Courts, but there is strong indica-

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*See also, *Eastman Photo Materials Co. v. Griffiths Cycle Corp.* (1898), 15 R.P.C. 105; *Walton v. Ashton* (1902), 2 Ch. 282; *Armour & Co. v. Master Tire & Rubber Co.* (1925), D.C.S.D. Ohio, 34 F. (2d) 201; *Vogue Co. v. Thompson-Hudson Co.* (1924), 6 Cir., 300 F. 509, cert. den. 273 U.S. 701, 47 S. Ct. 98, 71 L. Ed. 850; *Duro Co. v. Duro Co.* (1928), 3 Cir., 27 F. (2d) 339; *Standard Oil Co. v. California Peach & Fig Growers* (1928), D.C. Del., 28 F. (2d) 283; *California Fruit Growers Exchange et al. v. Sunkist Baking Co.* (1946), D.C.S.D. Ill., 68 F. Supp. 946; *Ford Motor Co. v. Ford Insecticide Corporation* (1947), D.C.E.D. Mich., 69 F. Supp. 935; *Acme Chemical Co. v. Dobkin* (1946), D.C.W.D. Pa., 68 F. Supp. 601. The latter case contains a lengthy review of pertinent decisions, including many which are not cited in this brief.

tion in the California cases that the state Courts would not decline to follow the general trend of authority.

In *Academy of Motion Picture Arts & Sciences v. Benson,* 15 C. (2d) 685, the parties were, of course, non-competitive, and, also, they were engaged in different enterprises; but in that case, which arose upon a demurrer to the complaint, there were allegations to the effect that the defendant "has induced certain persons and prospective students in particular into believing that her school was being conducted by or in connection with the plaintiff and that persons trained in the defendant's school had received or would receive 'Academy Awards' for meritorious performances".

In *Jackman v. Mau,* 78 C.A. (2d) 234, in which the parties likewise were not in competition with each other, one of them being a manufacturer and the other a trader, they were nevertheless engaged in handling the same general class of merchandise.

It is to be noted, however, that the California Courts have cited and quoted decisions, such as the *Yale Electric* case, in which the Courts have protected trade names and insignias from use in connection with different goods or classes of business. Moreover, the California Courts, as we have already indicated, have accepted and followed the "confusion of source" concept as the guiding principle in this field of the law. See, for example, *Eastern-Columbia, Inc. v. Waldman,* 30 C. (2d) 268, note 6; *Winfield v. Charles,* 77 C.A. (2d) 64; *Jackman v. Mau,* 78 C.A. (2d) 234; *Physicians Electric Service Corp. v. Adams,* 79 C.A. (2d)

550; *Academy of Motion Picture Arts & Sciences v. Benson,* 15 C. (2d) 685; *Law v. Crist,* 41 C.A. (2d) 862; *Carolina Pines v. Catalina Pines,* 128 C.A. 84; *Evans v. Shockley,* 58 C.A. 427; *Wood v. Peffer,* 55 C.A. (2d) 116.

In light of the above authorities, the present case presents no problem. Here the parties were engaged in the same general class of business. They were both in the finger ring business, and while the appellee Feature Ring Co. does business somewhat differently than appellant,* injunctive relief will not be denied merely because the businesses somewhat differ in size or modes of doing business.

The possibility that the appellees' business might be with a wider class of patronage than that of the appellant would not afford a sufficient basis for denying injunctive relief. In *Brooks Bros. v. Brooks Clothing of California,* 60 F.S. 442, the defendant sought to draw "a differentiation between the businesses based upon the dissimilarity of the merchandise of the two parties and its 'appeal' to the different social groups from which they seek custom" (p. 451). The argument was flatly rejected by the Court in the following language (pp. 453-454):

> "You cannot divide the clothing business into categories, according to the social group on which it may depend for patronage * * * 'Pigs is pigs' * * * Ours is an unstratified society with constant mobility of persons. Absent a 'caste' system, there can be no 'caste' in merchandising * * *."

*Appellant sells rings set with stones to retailers—appellee, Feature Ring Co., sold blanks or unset rings only.

We must not lose sight of the fact that the relationship between the appellees' business and that of the appellant is merely one aspect of the central issue of confusion. Considering the fact that the appellant's trade-mark is distinctive and must have acquired a unique significance in the public mind; that the appellees adopted and used a trade-mark strikingly similar to the appellant's designation; that the public or a part thereof would tend to associate appellees' business with the appellant's; that the appellees themselves presumably believed that they would profit by using something close to appellant's trade-mark; then it cannot fairly be said that the likelihood, if not certainty, of confusion thus established is completely overcome and eliminated by the differences existing between the appellees' mark and that of the appellant.

Certainly it cannot be said in this case that the appellees' designation "is so foreign to the owner's as to insure against any identification of the two" (*Yale Electric Corporation v. Robertson,* 27 F. (2d) 972, at p. 973). The appellant, therefore, is entitled to protection against the hazards created by the use of a trade-mark confusingly similar to its own.

The appellees' use of the appellant's trade-mark causes irreparable damage.

Inasmuch as the appellant has a property right in its trade-mark in California, it follows that the appellant is entitled to enjoin any unprivileged use of such trade designations which causes or threatens to cause injury or damage to its property.

The authorities have come to recognize that in modern society the primary purpose of a trade name or mark is often its advertising function. As *Callman* says, at p. 805, "Advertisement is the function of the trade-mark that requires and illustrates its independence as an economic value and a subject of legal protection." And any unauthorized use of a distinctive trade designation tends to weaken its advertising appeal and thereby to destroy its economic value.

It is said in *Philadelphia Storage Battery Co. v. Mindlin,* 296 N.Y.S. 176, at p. 179, a trade name or mark

> "* * * is more than a symbol of existing good will or a mere commercial signature; it has a creative function; it serves as a 'silent salesman' to attract custom. The dilution of its selling powers and 'the whittling away of its uniqueness' by use on noncompeting products constitutes a real injury for which there should be redress. Schechter, Rational Basis of Trademark Protection, 40 Harvard Law Review, 813; Fog and Fiction in Trademark Protection, 36 Columbia Law Review, 60."

Likewise, in *Arrow Distilleries v. Globe Brewing Company,* 117 F. (2d) 347, the Court observed that (p. 351):

> "* * * the rule that coined or fanciful marks or names should be given a much broader degree of protection than words in common use is sound, for it recognizes not only the orthodox basis of the law of trade-marks that the sale of the goods of one manufacturer or vendor as those of another should be prevented, *but also the fact that in modern business the trade-mark performs the added*

function of an advertising device, whose value may be injured or destroyed unless protected by the courts. Schechter, The Rational Basis of Trade Mark Protection, 40 Harvard Law Review 813; Restatement of Torts, sec. 715 (b)." (Emphasis ours.)

In *Bulova Watch Company v. Stolzberg,* 69 F.S. 543, the Court said (pp. 546-547):

"Gradually, however, the cases have come to recognize that it is the 'unfairness' of the defendant's conduct rather than the existence of 'competition' between plaintiff and defendant which forms the basis for the intervention of a court of equity. The trade-mark not only serves to designate the source of the owner's products, but also stands as a symbol of his good will and hence is an instrument for the creation and retention of custom. Schechter, F.I., The Rational Basis of Trade-Mark Protection, 40 Harvard Law Review, 813. Where the mark is strong, i.e., unique or fanciful, the courts have been more prone to grant protection from use on noncompeting goods."

* * * * * * *

"Whatever the distinction on which the decisions are rested, running through them all is a basic notion of 'unfairness'. Where the plaintiff has a fanciful or strong mark, built by long use and much expense, he has a substantial interest in his good will. A use by the defendant, even on non-competing goods, may result in injury to the plaintiff's reputation and dilute the quality of the trade-mark. If the relationship in the products is not too remote under the Waterman rule protection should be given."

In *Aetna Casualty & Surety Co. v. Aetna Auto Finance, Inc.* (1941), 5 Cir., 123 F. (2d) 582, cert. den. 315 U.S. 824, 62 S.Ct. 917, 86 L. Ed. 1220, the Court, after pointing out that the defendant's activities would necessarily result in depriving the plaintiff of some business, went on to say (p. 584):

> "But more significant and important than the fact that this is so, is the purpose evidenced by the choice, by this new comer into the field of automobile financing, of name and advertising matter. This purpose is to project itself into that business arena panoplied in a name already favorably known, rather than to come into it on its own merits, and slowly building, here a little there a little, establish its own place. * * * Cases in point here are [Citing cases]. These cases all hold that where as here it plainly appears that there is a purpose to reap where one has not sown, to gather where one has not planted, to build upon the work and reputation of another, the use of the advertising or trade name or distinguishing mark of another, is in its nature, fraudulent and will be enjoined."

In *Acme Chemical Co. v. Donkin,* 68 F.S. 601, the Court held that there was a likelihood of confusion, and added that (p. 614):

> "* * * It also appears to me there is a purpose to reap where one has not sown, to gather where one has not planted, to build upon the work and reputation of another, the use of the advertising or trade-name of the plaintiff and, under such circumstances, it is the duty of the court to grant injunctive relief. Aetna Casualty & Surety Co. v. Aetna Auto Finance, Inc., 5 Cir., 123 F. 2d 582."

Similarly, in *Lady Esther v. Lady Esther Corset Shoppe,* 317 Ill. App. 451, 148 A.L.R. 6, the Court recognized that unless injunctive relief were granted "the good-will of plaintiff, which it has built up at great expense over a period of years, would be whittled away" (p. 11). And in *Cleo Syrup Corp. v. Coca-Cola Co.,* 139 F. (2d) 416, the Court granted an injunction to prevent the plaintiff's good will from being "nibbled away" (p. 417).

In the words of a leading authority on this subject, the "real injury" in cases involving non-competing goods or businesses "is the gradual whittling away or dispersion of the identity and hold upon the public mind of the mark or name by its use upon non-competing goods. The more distinctive or unique the mark, the deeper is its impress upon the public consciousness, and the greater its need for protection against vitiation or dissociation from the particular product in connection with which it has been used." *Schechter, The Rational Basis of Trademark Protection,* 40 Harv. L. Rev. 813, 825.

Another authority has gone so far as to suggest that in cases such as the present one, where the danger of dilution exists, the Court "should not embark upon an obviously irrelevant inquiry into the possibility of confusion. Any use of such famous marks as 'Aunt Jemima' and 'Budweiser' or 'A. & P.' in connection with any product other than the original should be enjoined irrespective of whether there is any similarity between the goods". *Callman,* supra, at pp. 1342-1343.

The California Courts, also, have recognized that the "benefits of an exclusive trademark are to create and preserve a favorable reputation, *to stimulate the sale of a product,* and to distinguish it from similar competing products" (*Sun-Maid Raisin Growers v. Mosesian,* 84 C.A. 485, at p. 494, emphasis ours). See also *Hall v. Holstrom,* 106 C.A. 563, at p. 596. And while most of the California cases deal with personal names, geographical names, and other designations which are relatively "weak", in at least one case, namely, *Hall v. Holstrom,* 106 C.A. 563, involving a "strong" designation, "The White Spot" as applied to a restaurant, the Court granted injunctive relief upon the theory that the plaintiff had an exclusive property right in such name and that the use of a similar name by the defendant resulted in damage to the plaintiff's "standing and reputation" and to the "marketability of the plaintiff's business" (p. 571). While that case involved a registered trade-mark, the California Courts have pointed out that the "registration of a trade-mark, like the recording of any other instrument, is merely *prima facie* evidence of its validity and ownership". *Sun-Maid Raisin Growers v. Mosesian,* 84 C.A. 485, at p. 494.

It is apparent from the evidence in this case that the appellees' use of the appellant's distinctive trademark necessarily impairs its significance and value as an advertising device, particularly since the appellees appropriated such trade designation, as we have already shown, for the sole purpose of "riding the coattails" of the appellant's good will and reputation.

Unless injunctive relief is granted to preserve the identity and singularity of its valuable trade-mark, the appellant may one day find itself literally "hemmed in" by "LOCK" marks, and as a result, the value of its trade designation, and its great investment in it, may largely be destroyed.

There is no "commercial necessity" (*Eastern-Columbia, Inc. v. Waldman,* 30 C. (2d) 268, at p. 272) for the appellees to use a mark so closely similar to appellant's in connection with their business. By acts of calculated piracy they have appropriated the appellant's property, and such conduct has caused and threatens to cause irreparable injury and damage to the appellant and to its valuable trade designations. The appellant, therefore, is entitled to an injunction upon this ground, as well as upon the theory of confusion.

WHERE APPELLANT'S MARK OR TRADE NAME HAS COME TO HAVE A SECONDARY MEANING, SUCH MARK OR TRADE NAME WILL BE PROTECTED EVEN THOUGH SUCH MARK OR TRADE NAME IS NOT THE PROPER SUBJECT MATTER OF A VALID TRADE-MARK PER SE.

Although we believe "WED LOK" is a valid technical trade-name, appellant is entitled to relief regardless of whether it is a valid technical trade-mark or not.

> 63 *Corpus Juris,* Section 101, pp. 391, 392.
>
> "An exclusive proprietary interest such as a trade-mark or copyright, in the terms or symbols used to palm off the goods of one manufacturer

or vendor as those of another, is not essential to the maintenance of a suit to enjoin or redress the perpetration of the wrong * * *. *Relief will be afforded regardless of whether or not the deceptive words or marks are valid technical trade-marks.* The cases are very numerous where relief has been afforded upon the ground of unfair competition against a deceptive use of generic or descriptive names and marks, personal, geographical, corporate, and other names, *none of which are capable of exclusive appropriation as technical trade-marks.*" (Emphasis ours.)

Our Circuit Court of Appeals for the Ninth Circuit so ruled in *Stork Restaurant v. Sahati,* 166 Fed. (2d) 348, and they quoted the following rule with approval:

"It is asserted by defendants that an absolute injunction will not be granted for the infringement of the right to use a word in what is called a 'secondary meaning' as distinguished from a technical trademark. Where words have acquired, as is established beyond dispute in this case, a fanciful meaning—a meaning that has no connection with their common meaning, it may be more properly said that such meaning is their primary meaning in so far as their use in business is concerned. Their common meaning has dropped into the background. Otherwise no right to use them to the exclusion of others would have been acquired. *When, however, words have acquired such a sense and are the subject of the good will and reputation of a business which they designate, there is little if anything left to distinguish them from a trademark, a symbol, characters or words which have no common meaning and which are artificial, insofar as the scope of*

protection afforded to the one who has the prior right." (Emphasis ours.)

Le Blume Import Co., Inc. v. Coty, et al. (C. C.A. 2, 1923), 293 Fed. 344.

"For it is entirely clear that, if a word which in its primary sense is descriptive has nevertheless been used so long or so exclusively in a particular market by a particular dealer that his product in that market and to its purchasing public has come to mean that the article in connection with which the word is used is the product of a particular producer, it acquires a secondary meaning, which is indicative of the manufacturer and the excellence of the thing produced, and enables the manufacturer to assert an exclusive right in the word. Nims on Unfair Competition and Trade-Marks (2d Ed.) § 37."

Words which have a primary meaning of their own, such as words descriptive of the goods or a quality or character of the goods, which were not capable of exclusive appropriation as a trade-mark originally or at the time of its adoption, may nevertheless by long use in connection with the goods or business of a particular trader come to be understood by the public as designating the goods or business of that particular trader. Such a word has a secondary meaning and it may not be used in a trade-mark sense by a competitor.

G. & C. Merriam Co. v. Saalfield (C.C.A. 6-1912), 198 Fed. 369.

"* * * It contemplates that a word or phrase originally, and in that sense primarily, incapable

of exclusive appropriation with reference to an article on the market, because geographically or otherwise descriptive, might nevertheless have been used so long and so exclusively by one producer with reference to his article that, in that trade and to that branch of the purchasing public, the word or phrase had come to mean that the article was his product; in other words, had come to be, to them, his trade-mark. * * *"

See also:

Coca-Cola Co. v. Koke Co., 254 U.S. 143, 41 S. Ct. 113;

American Lead Pencil Co. v. L. Gottlieb & Sons (C.C. S.D. N.Y.), 181 Fed. 178;

Pinaud, Inc. v. Huebschman (D.C. N.Y.), 27 Fed. (2d) 531 (affirmed 27 Fed. (2d) 538).

CONCLUSION.

We respectfully submit that this Court find:

1. That appellant's trade-mark "WED LOK" is a distinctive and valid trade-mark.

2. That appellant's trade-mark "WED LOK" by its exclusive, extensive and long use, has acquired a secondary meaning.

3. That the trade-mark "FEATURE LOCK" used in connection with wedding ring ensembles is confusingly similar to appellant's trade-mark "WED LOK".

4. That there has been "confusion of source" respecting appellees' products in the customers of the wholesale business conducted by appellant.

5. That the result of the use of the trade-mark "FEATURE LOCK", and similar composite marks on appellees' products, has been a dilution, diminishing and lessening of the good will of the appellant, as represented by its trade-mark "WED LOK", and its investment in the sales and advertising thereof.

6. That appellees, and each of them, by the use of the trade-mark "FEATURE LOCK" upon wedding ring ensembles have infringed upon appellant's trade-mark rights and have unfairly competed with appellant.

Dated, San Francisco, California,
May 12, 1950.

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IN THE UNITED STATES COURT OF APPEALS

For the Ninth Circuit

Granat Bros., A Corporation, Appellant-Appellee, vs. Samuel H. Friend, S. Herbert Friend, Leonard V. Bloch, Co-Partners doing business under the firm name and style of S. H. Friend: and Herbert Brown: and Feature Ring Co. Inc., Appellees-Appellants.	Nos. 12407 and 12408

BRIEF FOR FEATURE RING CO. INC. ET AL

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IN THE UNITED STATES COURT OF APPEALS

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BRIEF FOR FEATURE RING CO. INC. ET AL

Jurisdictional Statement

The actions here are for alleged trade mark infringement and unfair competition (No. 12407, pp. 2-8; No. 12408, pp. 2-8), jurisdiction being based on the Trade Mark Laws of the United States (15 USCA, Chap. 22). The actions*

*Granat had a manufacturing plant and operated three retail jewelry stores (R., p. 89). Except for its retail stores its only sales were to the trade through L. A. Giacobbi, known as Granat Mfg. Co. (R., pp. 90-91). For the purposes of this appeal no distinction need be made between these companies. The defendants here are Feature Ring Co. Inc., a New York corporation and two of its customers. The plaintiff below will be referred to as "Granat" and all of the defendants as "Feature."

The formal papers—Pleadings, Findings, etc., in the two cases are printed in separate volumes. But by stipulation, the testimony is printed in a joint record. It further was agreed the parties would file single briefs covering both appeals and that Granat would file a reply (see Stipulation of December 21, 1949, No. 12407, pp. 79-80).

Throughout this Brief italics and parentheses within quotes are ours unless the contrary is indicated.

are founded on Granat's claim that Feature's use of "Feature Lock" is in infringement of Granat's use of "Wed-Lok" and constitutes unfair competition. Feature, denying that "Wed-Lok" is a valid mark or that it was infringed, counterclaimed charging unfair competition based on Granat's threatening circularization of the industry (No. 12407, pp. 25-26; No. 12408, p. 9). The United States District Court for the Northern District of California, Southern Division, on September 8, 1949, entered final judgment that Granat's mark was valid, that Feature did not infringe, and that neither party had unfairly competed with the other (No. 12407, pp. 43-46; No. 12408, pp. 17-19). These appeals, sanctioned by 28 USCA § 1291, followed (No. 12407, pp. 46-47; No. 12408, pp. 20-21).

Statement of the Case

The Origin and Use of "Wed-Lok"

The District Court found (No. 12407, p. 39, Par. VIII; No. 12408, p. 13, Par. VIII):

> "Plaintiff's trade-mark 'Wed-Lok' is not primarily descriptive of the ring ensembles marketed and sold by plaintiff, but it is used in a suggestive or figurative sense and is a valid registered trade-mark."

The facts do not sustain this finding.

In 1934 Granat Bros. adopted the word "Wed-Lok" (R., p. 91). Repeatedly Granat states that this was used in conjunction with "a diamond wedding and engagement ring ensemble"—or other equivalent phrases (Gr. Br., pp. 2, 3, 8-9, 17, 37).

But, nowhere does Granat acknowledge the undeniable facts that the mark has been used only on engagement and wedding rings *which lock together* and that it has been used only descriptively.

Shortly after Granat commenced using "Wed-Lok" for interlocking rings in 1934, it discovered that the word "Wedlock" had been registered for rings, as No. 185,365, at an earlier period (R., pp. 115-116, 229-231). In 1936 it acquired this other registration (R., pp. 101-103, 115-116, 232). The file history shows that the original registrant of "Wedlock" had applied for registration under the Act of 1905 and that the application was rejected *as descriptive,* that the applicant *acquiesced in the rejection* and amended the application to bring it under the Act of 1920, which did not proscribe descriptive marks (Dfts' Ex. 36).

In 1944—ten years after Granat commenced using "Wed-Lok"—it applied for its registration. And, as was true of the "Wedlock" registration, Granat's application was filed under the Act of 1905. It, too, was rejected *as descriptive* and once more *the applicant acquiesced in the rejection* and amended the application to bring it under the Act of 1920. It then issued as No. 430,436 (Dfts' Ex. 5; R., pp. 112-115).

No more definitive admissions of descriptiveness could be found.

And throughout, the marks *have been used by Granat descriptively.*

Thus, in one of Granat's earliest advertisements it was said:

> "The rings interlock, as it were * * * The idea suggested the name 'Wed-Lok' * * *" (R., p. 105; Dfts' Ex. 40:47*).

---

* Pretrial depositions were taken of certain officers of Granat in San Francisco, and of some of Feature's customers in New York. The San Francisco depositions are Dfts' Ex. 40 and the New York depositions are Dfts' Ex. 39. The exhibits introduced with these depositions will be cited by their number, preceded by the exhibit number of the deposition—thus, "Dfts' Ex. 40:47."

Again, in this first period, Granat advertised that its "INTERLOCKING ensemble" would "hereafter be known as the 'Wed-Lok [interlocking] ENSEMBLE'" (Dfts' Ex. 40:22).

During the second period of use (1936-1941) the advertising was persistently descriptive. Thus, in December 1940 there is the advertised statement—"* * * Wed-Lok diamond ensembles, the rings that miraculously lock together" (Dfts' Ex. 40:77).

And in the final period, the same practices continued. In the "Exciting Discovery" announcement of 1947, the rings are spoken of as separate "but a tiny gesture locks them together" (Dfts' Ex. 40:80; see also, Dfts' Ex. 40:89). And in December 1948 Granat advertised " 'Wed-Lok' * * * They lock and unlock instantly" (Dfts' Ex. 40:91).

Going even further was Jacoby's announcement—"These are the rings that 'Wed-Lok' together" (Dfts' Ex. 40:23; R., pp. 107-109).

Similar statements to those quoted are found in substantially all of the advertising of Granat or of its customers. And those customers constantly used the word descriptively. Thus, Jacoby testified that "Wed-Lok" described not the entire ring ensemble but "the mechanism; the mechanical part" (R., p. 467), and Kernis said that his knowledge of "Wed-Lok" "goes back to probably 1937 or '38, where they used the term 'Wed-Lok' at that time, *meaning that the two rings hooked together, or locked together* * * *" (R., p. 622). Even Mr. Shapiro—a more than usually biased partisan—admitted that the use of the word "lock" to advertise a product of the sort here in issue, "would be the only way" it could be done (R., p. 719; see also, pp. 514, 516-517, 549-550, 561, 610-612, 701; see also, Dfts' Ex. 39: pp. 69, 73, 80-81, 92).

Finally, at the hearing here, Joseph Granat, Granat's president, testified as follows (R., pp. 106-107):

> "Q. You have called them interlocking, have you not, Mr. Granat? A. Yes, I have called them that. Here the rings are; they don't necessarily lock, or they don't interlock. We call them interlocking, yes, we did.
>
> "Q. And the advertisements have constantly referred to them in a descriptive sense, have they not, Mr. Granat? A. Oh, yes" (see also, p. 105).

In the face of this history, the mark, to survive, must be shown to have acquired a secondary meaning. But no showing of secondary meaning was made and the District Court refused so to find (No. 12407, p. 51, Par. 5; No. 12408, p. 24, Par. 5). The facts disclose the soundness of this refusal.

When Granat learned in 1934 of the earlier use of "Wedlock" it discontinued its use of "Wed-Lok" entirely (R., pp. 229-231). Its use during the first period is indicated solely by thirteen local newspaper advertisements (Dfts' Ex. 40:22-29, 31-33), and one trade magazine advertisement (Dfts' Ex. 40:30).

In March 1936, slightly over a year after Granat discontinued using "Wed-Lok," it purchased the adversely held "Wedlock" registration, and in April 1936 its second period of use of the word "Wed-Lok" commenced (R., pp. 101-105).

By 1939 the number of advertisements of "Wed-Lok" in San Francisco and Oakland newspapers had dropped to four (R., pp. 122-124), which were followed in 1940 by eleven advertisements (R., pp. 124-125).

In 1941 and 1942 Granat advertised three times in each year, and in 1943 it advertised twice (Pl's Exs. Q thru X, WW; R., pp. 145-148). But in 1943 the mark had become so unimportant (cf., R., p. 219), that Granat failed even to

list it in "Trade-Marks of the Jewelry and Kindred Trades" *although it did list eight other marks* (Dfts' Ex. 17; R., pp. 125-127, 225).

From then until May 1947 there were no advertisements of "Wed-Lok" of any nature, and while scattered sales appear to have been made (R., pp. 117-118, 153-154, 163-167, 176-177), even the favored dealers of Granat were unable to secure any "Wed-Lok" sets (R., pp. 176-177, 445, 458-459, 485, 519-520, 530, 555, 559, 647, 705).

In May 1947, after seven years of almost complete eclipse, "Wed-Lok" made its second reappearance with the following public statement:

> "Announcing Wed-Lok
> "An Exciting Discovery
>
> "No other rings in all the world like these! This entirely new, patented, Granat engagement and wedding ring ensemble is the climax of long years of study, research and experimentation" (Dfts' Ex. 40:80; R., pp. 234-235).

During the period May 1947 to April 1948 "Wed-Lok" was advertised increasingly by Granat and by certain of its customers, the record showing slightly over 300 advertisements in daily newspapers (Pl's Exs. F, DD, EE, FF; and see Exhibits of Granat's retailer-witnesses), and seven advertisements in national magazines (Pl's Exs. II, KK, LL; see also, R., p. 207).

While Granat adduced no records of advertising expenditures (R., pp. 183-186; and see pp. 255-257)—indeed, it seems purposefully to have avoided this (Dfts' Ex.40: p. 193)—the District Court found that "such advertising, exclusive of extensive dealer advertising, cost approximately One Hundred Fifty Three Thousand Dollars ($153,000.00)" from 1934 to date, exclusive of the war years 1942-1945 (No. 12407, p. 40, Par.XI; No. 12408, pp. 13-14,

Par.XI). Almost a third of this total was incurred within the year when Feature's locking rings appeared (cf., R., pp. 179-185).

During the period from 1934 on there was entire eclipse from late 1934 until early 1936, and substantial eclipse from 1940 to the Spring of 1947. But even in the periods of use there is no reliable evidence that the word "Wed-Lok" had come to mean anything to the public. It is true that certain of Granat's retailer-customers said they had calls for "Wed-Lok" rings (R., pp. 448, 478, 508, 583, 610, 639, 659, 696). However, analysis of their testimony shows that customers desired simply *a locking type ring* (R., pp. 448-449, 479, 490, 508-509, 696, 703-704), and that these witnesses used that desire as a means for furthering their sales of "Wed-Lok" rings. Thus, Jackson said (R., p. 490):

> "* * * I had had customers coming in and asking me about *different lock rings,* which I didn't know about until all this came up here recently. * * * When I would show them these Granat rings they would say, 'No, there is one that locks different than this,' which I didn't know about at that time."

Even more revealing is the testimony of Goldblatt. He explained why "lock" was an important and valuable part of "Wed-Lok" as follows (R., p. 508):

> "Well, it would be to us for the reason that a great many of our customers come in and designate or call for a ring *as a lock type ring or a lock together ring,* and to us it means the Granat Wed-Lok."

Similarly, Shapiro, admitting that customers "come in and demand and want the locking ring" (R., p. 703), said (R., p. 704):

> "Well, when they are questioned, they are asked, *and if you refresh them,* they want a 'Wed-Lok' * * *."

And Kernis blows the claim that "Wed-Lok" meant anything to the customer completely out of the water. He was asked (R., p. 642):

> "Q. To your knowledge, was the Wed-Lok name applied to these interlocking rings to distinguish them from the other types of merchandise sold by Granat Bros.?"

to which he answered:

> "I think it was the principle, mainly, of it locking together that sold it at the time."

Tying in perfectly with this testimony is that of Mr. Bloch and of Mr. Magoon. The former, a jewelry wholesaler, said (R., p. 395):

> "At the present time there is a demand for locking ring sets. The locking ring sets are a factor in the business, and retail customers called on us for locking sets" (see also, pp. 375-376).

And (R., p. 393):

> "It [national advertising] has been tried for many years, but no one has ever successfully put a real big diamond ring nationally known, a nationally known item, in the jewelry stores. *The jewelers still prefer to sell the diamond rings under their own name,* because that is their reputation in the local town" (see also, p. 392).

To the same effect, Mr. Magoon, a retail jeweler, testified (R., p. 408):

> "In all my years in business we have sold our firm's, nobody's ring. I don't stress anybody's name at all * * * I don't think [a trade name] has any great bearing on the subject. It hasn't so far as I am concerned" (see also, Dfts' Ex. 39: pp. 68, 86, 91).

Beyond question, it is a custom of the trade for the jeweler to sell on his own rather than on his manufacturer's reputation. Equally beyond question, "Wed-Lok" had acquired no secondary meaning and the District Court was correct in refusing to find that it had.

Feature Ring Company and Its Mark "Feature Lock"

Feature Ring Company was the name given in 1934 or 1935 to the business of Henry Peterson (see Dfts' Ex. 31; R., pp. 260, 281). It has since become Feature Ring Co. Inc. (Consolidated Answer, Par. 2). From its inception it has engaged in the manufacture of gold and platinum blanks or findings—that is, the rings without the stones (R., pp. 285, 312). By 1945 the business of Feature had grown to a million and a half dollars per year (R., pp. 314-315).

About six or seven years ago Feature became interested in developing interlocking wedding and engagement rings (R., pp. 282-283). Work of an intermittent nature went forward on this until "a good interlocking set" was perfected. Mechanically, this was entirely unlike any Granat set (R., pp. 282-283) but it did infringe an adversely held patent, which Feature was able to purchase (R., p. 283).

With respect to the name of this set, Mr. Peterson testified (R., p. 378):

> "* * * for years, we have been selling rings known as 'Feature Rings.' For 15 years. We built a fine reputation on selling 'Feature Rings' for that period of time, and when we came out with an interlocking set, to distinguish those from our regular merchandise we took the same name, 'Feature,' and we added the descriptive word 'lock' to it, and called them 'Feature Lock Rings' instead of 'Feature Rings.'" (see also, pp. 261-262).

When the "Feature Lock" sets were introduced in May 1948 (R., p. 261), Feature ran a full page advertisement in every known trade magazine, announcing the new product and showing it to be that of Feature Ring Company of New York City (Dfts' Exs. 10, 30; R., pp. 286-292). Similar advertisements have since been run periodically (Dfts' Exs. 10, 14, 15, 16).

In marketing this new product, Feature sold only through distributors, of which it had about 200 (R., p. 321). The distributors were given the alternative of selling the sets under the trade mark "Feature Lock"* or under any name they might choose (R., pp. 270-271, 288, 301-302).

Granat immediately notified all such users of the descriptive word "Lock" that their use "constitutes an infringement of [Granat's] above trade-mark registrations, and also constitutes unfair competition in trade" (R., pp. 137-142; Dfts' Exs. 18-29).

In August 1948, these actions were commenced. Granat avoided any action against Feature Ring Company, but the latter, in order to protect its customers, intervened in these actions (R., pp. 296-297, 308-309).

Specification of Errors

The errors of the District Court which Feature will urge in this Court (No. 12407, pp. 72-73, 83; No. 12408, pp. 30-31) are as follows:

1. The Court erred in finding that plaintiff's trade mark "Wed-Lok" is a distinctive and valid trade mark.

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* This mark has been registered by Feature Ring Co. Inc. as No. 506,514, the word "Lock" however, being disclaimed (Dfts' Ex 6; R., pp. 284, 137).

2. The Court erred in not finding that plaintiff has competed unfairly with defendants Feature Ring Co., Inc., S. Herbert Friend or Leonard V. Bloch.

3. The Court erred in dismissing the counterclaim of the defendants Feature Ring Co., Inc., S. Herbert Friend and Leonard V. Bloch.

4. The Court erred in failing to award damages to defendants herein on their counterclaim.

5. The Court erred in failing to award defendants their costs incurred on the trial of the cause.

Summary of the Argument

The word "Wed-Lock"—for locking wedding and engagement rings sets—is descriptive. Granat's predecessor and Granat admitted this when, in response to the Patent Office rejections of their applications for registration *because descriptive,* they amended the applications to take them from under the Act of 1905, which proscribed descriptive trade marks, and bring them under the Act of 1920, which did not. From the inception of use of "Wed-Lok" and up to the time of trial, Granat and its customers have used the mark only in a descriptive sense. While a mark, descriptive in its primary sense, may by persistent nondescriptive use become the symbol of that user, thus losing its original meaning and taking on a new or "secondary meaning," a mark which continues to be used descriptively can never acquire a secondary meaning. Consistent with this, the proofs here show that the public has not regarded articles bearing the name "Wed-Lok" as coming from any particular source. To the contrary, the proofs do show that the consuming public is largely unaware of or indifferent to the name of any ring or ring ensemble.

The only similarity between "Wed-Lok" and Feature's trade mark "Feature Lock" is that between the corruption

"Lok" and the word "Lock." In both cases, however, they are used to indicate that the product locks. There is no similarity in sound or meaning or in any other characteristic between the word "Wed" and the word "Feature." And, as was found by the District Court, there has been in this case neither passing off nor the likelihood of passing off. Consequently, Feature neither infringes nor is guilty of unfair competition.

Granat's campaign against Feature's customers who used the word "Lock" to describe a lock, intimidated those customers and damaged Feature. No attempt was made by Granat to ascertain or judge of over-all similarity or dissimilarity of the various "Lock" marks to "Wed-Lok." Thus Granat's action was without probable cause. Feature, therefore, is entitled to relief under its counterclaim.

Argument

"Wed-Lok" is an Invalid Mark

"Wed-Lok" is Descriptive and Has Been Descriptively Used

Granat says that "It requires no argument to show that appellant's trade mark is unique, arbitrary and fanciful" (Gr. Br., p. 50).

In that statement Granat *assumes* the one thing which it must *prove*—and the one thing which it has not proved. For the word "Wed-Lok"—used as a name for wedding and engagement rings which lock together, is anything but "unique or "arbitrary" or "fanciful." It is purely descriptive, and, from its inception, has been used only descriptively.

When, as has been shown, registration was attempted, whether spelled "Wedlock" or "Wed-Lok"—the Patent Office said it was descriptive, and the applicants, Granat's

predecessor in title in 1924, and Granat, itself, in 1944, agreed* (ante, p. 3). And, in so agreeing, Granat made its record in the Patent Office conform with its conduct throughout.

The long catalog of descriptive use (ante, pp. 3-5), demonstrates that the District Court erred in its finding that "Wed-Lok" is "not primarily descriptive of the ring ensembles marketed and sold by plaintiff but it is used in a suggestive or figurative sense * * *."

In the recent decision of *Armstrong Co.* v. *Nu-Enamel Corp.*, 305 U. S. 315, the Supreme Court tersely stated (p. 335):

> "But a mark which is descriptive is not a good trade-mark at common law."

This statement is but a reiteration of the rule that has prevailed since at least 1871. In that year, the Supreme Court in *Canal Company* v. *Clark*, 13 Wall. 311, said (p. 323):

> "No one can claim protection for the exclusive use of a trade-mark or trade-name which would practically give him a monopoly in the sale of any goods other than those produced or made by himself. If he could, the public would be injured rather than protected, for competition would be destroyed. Nor can a generic name, or a name merely descriptive of an article of

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* Such acquiescence should amount to an estoppel to make a contrary contention (see *Holzapfel's Co.* v. *Rahtjen's Co.*, 183 U. S. 1, 10-12). In an analogous situation arising during the prosecution of a patent application, it has been said, "If dissatisfied with the rejection he should pursue his remedy by appeal; and where, in order to get his patent, he accepts one with a narrower claim, he is bound by it" (*I. T. S. Rubber Co.* v. *Essex Co.*, 272 U. S. 429, 443; *Exhibit Supply Co.* v. *Ace Corp.*, 315 U. S. 126, 136; see also, *Steem-Electric Corp.* v. *Herzfeld-Phillipson Co.* (C. C. A. 7th Cir.), 118 F. 2d 122, 127).

> trade, of its qualities, ingredients, or characteristics, be employed as a trade-mark and the exclusive use of it be entitled to legal protection."

And the rule of those cases is the rule of this Court. *Jell-Well Dessert Co.* v. *Jell-X-Cell Co.,* 22 F. 2d 522; *Brooten* v. *Oregon Kelp Ore Products Co.,* 24 F. 2d 496; *Van Camp Sea Food Co.* v. *Cohn-Hopkins,* 56 F. 2d 797.

In the *Jell-Well* case, this Court stated the general rule (22 F. 2d 523):

> "Many cases might be cited in support of the principle, sustained by the Supreme Court as founded on reason and authority, that there can be no appropriation of a name which is descriptive of an article of trade, its qualities or ingredients, or any word, letters, or symbols which others may employ with equal truth, and as a consequence have an equal right to use for the same purpose."

The product there involved was a gelatine, and, as this Court noted (p. 523), "it is, of course, necessary that the gelatine used must jell well." Similarly, Granat's wedding and engagement ring ensembles must "'Wed-Lok' together." This Court continued (p. 523): "We cannot regard 'Jell-Well' as a fanciful or arbitrary term. Plaintiff itself gave to the words their intended meaning, by its advertisements containing the sentence: 'This dessert is named Jell-Well because it always jells and jells well." In exact parallel, Granat says, "The idea [that the rings interlock] suggested the name 'Wed-Lok'."

And in the *Jell-Well* case, the Court concluded (p. 523), that "Jell-Well" was "primarily descriptive" and that "hence it cannot be withdrawn from public use by adoption as a trade-mark."

The *Brooten* case was somewhat similar. There, the only question was whether the words "Kelp Ore" were a

valid trade mark. There, the plaintiff had discovered and marketed a mineralized kelp and its literature had explained that "Kelp Ore" was the name of the product. This Court concluded plaintiff "intended the name to be generically descriptive" and held it invalid as a trade mark (24 F. 2d 497). Here, the facts parallel those of the *Brooten* case because Granat's advertisements constantly have shown "Wed-Lok" to be descriptive of locking wedding and engagement rings—and "Wed-Lok" too is invalid.

The *Van Camp* case involved the trade mark "Chicken of the Sea" as applied to young tuna fish. This Court, in holding the mark descriptive and invalid, said (56 F. 2d 789):

> "The basis of the decision in [*Van Camp Sea Food Co.* v. *Westgate Sea Products Co.*, 28 F. 2d 957] was that the word 'Chicken' was descriptive of the product packed, and in effect that 'Chicken' as applied to tuna indicated 'young tuna' or 'tender tuna,' and is no more subject to appropriation than the word 'young' or the word 'tender.' The phrase 'of the sea,' as applied to fish caught in the sea, is also descriptive. The expression 'Chicken of the Sea tuna' would simply mean 'young tuna caught in the sea,' a purely descriptive title, and is not at all a fanciful or arbitrary designation or mark, so that the entire phrase is no more subject to appropriation than is the word 'chicken,' which we have already held could not be monopolized by trade-mark."

Application of the rule of these cases to the facts here demonstrates the invalidity of "Wed-Lok" as a trade mark.

Granat, however, ignores them and relies upon *N. K. Fairbank Co.* v. *Luckel, King & Cake Soap Co.*, 102 Fed. 327—decided by this Court in 1900. The plaintiff there

was the owner of the trade mark "Gold Dust" used for washing powder. The defendant, at a later date, adopted, for the same product, the name "Gold Drop." This Court, noting that the question "may be said to be a close one" (102 Fed. 332), held "Gold Drop" to be an infringement of "Gold Dust."

The facts, however, clearly distinguish that case from the instant one.

(a) The trade mark "Gold Dust" is entirely fanciful and is not suggested by washing powder. "Wed-Lok," on the other hand, is entirely descriptive.

(b) Of the two words comprising the mark "Gold Dust," the first, "Gold," unquestionably is the dominant word, and it is the word borrowed by the defendant. Here, the dominant word of "Wed-Lok," if any there be, is "Wed," and certainly the dominant word of "Feature Lock" is "Feature"—the word "Lock" in both cases simply referring to a lock.

(c) "Gold Drop" and "Gold Dust" are substantially *idem sonans,* whereas "Feature" so clearly distinguishes from "Wed" that there is no similarity of sound.

(d) In the *Fairbank* case, confusion and palming off were shown (102 Fed. 330). In the instant case, neither confusion nor palming off was shown, and the District Court found there was no likelihood of passing off (No. 12407, p. 40).

The *Fairbank* case, therefore, lends no support to Granat's position here; and even though Granat thinks it does not require argument to show that "Wed-Lok" is unique or arbitrary or fanciful, the facts show that it possesses no characteristic of a valid trade mark.

"Wed-Lok" Has Not Acquired a Secondary Meaning

Granat complains that while the District Court found "that the appellant's trade mark is valid, the Court refused to find that a secondary meaning attached thereto" Gr. Br., p. 53). In fact, Granat goes considerably beyond complaining at the failure of the District Court to find secondary meaning in the word "Wed-Lok"; it asks this Court to determine that it has established a monopolistic right to the use of the word "lock." Thus, it says (Gr. Br., p. 17):

> "Appellant by its long use of the word 'LOK' as a suffix in its trade-mark designating *ring ensembles,* is entitled to the exclusive use of the word 'LOK' or 'LOCK' in this field."

But the law sanctions no finding of secondary meaning here and no basis for granting to Granat a monopoly in the noun or verb "lock."

Under the doctrine of secondary meaning, a word, descriptive or otherwise ineligible as a trade mark, is in effect removed from the public domain and the user of the mark is given what amounts to a monopoly in the use of that word. Obviously, it is contrary to the policy of the law to allow any such monopoly in any except the clearest cases—cases in which the rights of the user are overwhelmingly shown and in which the correlative injury to the public is negligible (*Upjohn Co.* v. *Wm. S. Merrell Chemical Co.* (C.C.A. 6th Cir.), 269 Fed. 209, 211 c.d., 257 U. S. 638)). And the burden of proving such a case is on the plaintiff (*Kellogg Co.* v. *Nat. Biscuit Co.,* 305 U. S. 111, 118).

The Supreme Court in the *Kellogg* case and the Supreme Court of California in *Eastern Colombia, Inc.* v. *Waldman,*

30 C.2d 268, 74 U.S.P.Q. 114, recently defined secondary meaning. See also, *Phillips* v. *The Governor & Co. Etc.* (C.C.A. 9th Cir.), 79 F.2d 971, 973; *Brooks Bros.* v. *Brooks Clothing of California* (D.C.S.D.Cal.C.D.), 60 F. Supp. 442, 450, aff'd by this Court on opinion below, 158 F.2d 798, c.d., 331 U. S. 824.

The *Kellogg* case was for unfair competition involving the use by defendant of the name "Shredded Wheat," which for a long period had been made by plaintiff and its predecessors under patents. The defendant, at a later period, commenced the manufacture of a similar product. The Supreme Court held that the name "Shredded Wheat" had become generic and that upon the expiration of the patents all were entitled to use it (305 U. S. 116-118).

Plaintiff undertook to avoid the effect of this rule because, it said, its long use of the words had given to them a secondary meaning. This claim the Supreme Court rejected (305 U. S. 118) saying:

> "The evidence shows only that due to the long period in which the plaintiff or its predecessor was the only manufacturer of the product, many people have come to associate the product, and as a consequence the name by which the product is generally known, with the plaintiff's factory at Niagara Falls. But to establish a trade name in the term 'shredded wheat' the plaintiff must show more than a subordinate meaning which applies to it. It must show that the primary significance of the term *in the minds of the consuming public* is not the product but the producer."

The *Eastern Columbia* case involved plaintiff's trade mark "Eastern Columbia" which the Court said had, beyond dispute, acquired a fanciful meaning (30 C.2d 271). The Court, in holding that secondary meaning attached,

defined that expression as follows (p. 271):

> "Where words have acquired * * * a fanciful meaning—a meaning that has no connection with their common meaning, it may be more properly said that such meaning is their primary meaning insofar as their use in business is concerned. Their common meaning has dropped into the background."

In *Stork Restaurant* v. *Sahati,* 166 F.2d 348, 352, this Court, *inter alia,* approvingly quoted this definition.

Granat, too, quotes it (Gr. Br., pp. 77-78) and elsewhere repeatedly refers to the *Eastern Columbia* case (Gr. Br., pp. 34, 46, 47, 49, 52, 68, 76), but nowhere does it attempt to bring itself within the definition or to show that secondary meaning attaches to "Wed-Lok."

The facts here show "Wed-Lok" to be outside the definitions of the *Kellogg* and the *Eastern Columbia* cases. They show that the word "Wed-Lok" has not "acquired * * * a fanciful meaning—a meaning that has no connection with [its] common meaning." And they show the word has no meaning "in the minds of the consuming public" (ante, pp. 3-9).

A further factor militating against the application of the secondary meaning doctrine here, arises out of Granat's on-again-off-again use of "Wed-Lok." As has been shown, "Wed-Lok" was not used between December of 1934 and the Spring of 1936; and, if used at all during the war period, the use was so small and spasmodic as to preclude any public consciousness of it (ante, pp. 5-7). *Phillips* v. *The Governor & Co. Etc.* (C.C.A. 9th Cir.), 79 F.2d 971, 973; *Brooks Bros.* v. *Brooks Clothing of California* (D.C. S.D.Cal.C.D.), 60 F. Supp. 442, 450, 456, aff'd (C.C.A. 9th Cir.), 158 F.2d 798, c.d., 331 U. S. 824; *Standard Varnish Works* v. *Fisher, Thorsen & Co.* (C. C. Ore.), 153 Fed. 928, 931; *Upjohn Co.* v. *Wm. S. Merrell Chemical Co.*

(C.C.A. 6th Cir.), 269 Fed. 209, 213, c.d., 257 U. S. 638. And it was only ten months after the second reappearance of "Wed-Lok" that Feature entered the field.*

But despite all this, Granat urges that the word "Wed-Lok" has come to indicate to the public the producer of the product, and points, as proof, to the testimony of a number of its retailer-customers. But these customer-witnesses do not help Granat for two reasons:

1. Retail-customers are not "the consuming public," nor are they representative of it. And the courts, recognizing their special position and that their job made knowledge of the mark inescapable, have refused to accept such testimony as establishing anything "in the minds of the consuming public."

Thus, in *Helmet Co.* v. *Wm. Wrigley, Jr., Co.* (C.C.A. 6th Cir.), 245 Fed. 824, the Court said (p. 830):

> "It is well settled that dealers are not so much to be considered as are the ordinary users; the former will of course know the manufacturers from whom their purchases are made, but the latter are open to deception whether practiced by the manufacturer or the dealer; * * *."

So also, *Augstein* v. *Saks* (D.C.N.D.Cal.S.D.), 69 F. Supp. 547, 549-550; *Lerner Stores Corporation* v. *Lerner* (C.C.A. 9th Cir.), 162 F.2d 160, 163; *Hiram Walker & Sons* v. *Penn-Maryland Corporation* (C.C.A. 2d Cir.), 79 F.2d 836, 839; *Steem-Electric Corp.* v. *Herzfeld-Phillipson Co.* (C.C.A.

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* During the hearing Granat introduced a considerable number of advertisements relating to a period *after* Feature had come into the field. The rule, however, is plain that "The *secondary meaning must have been established when defendant entered the field*" (*Lucien Lelong, Inc.* v. *Lander Co. Inc.* (C. C. A. 2d Cir.), 164 F. 2d 395, 397; *Upjohn Co.* v. *Wm. S. Merrell Chemical Co.* (C. C. A. 6th Cir.), 269 Fed. 209, 213, c.d., 257 U. S. 638).

7th Cir.), 118 F.2d 122, 124-125; *O. & W. Thum Co.* v. *Dickinson* (C.C.A. 6th Cir.), 245 Fed. 609, 613, 614.

2. The testimony of Granat's customers shows the mark to be meaningless. Naturally, they testified to acquaintance with "Wed-Lok." As Jackson said, "I sell them. I guess I should" (Jackson, R., p. 473; see also, Goldblatt, R. pp. 498-499; Jacoby, R., p. 419; Kleiger, R., p. 528; Navarro, R., p. 572; Van Sipma, R., pp. 598-599; Kernis, R., p. 622; Gamler, R., pp. 650-651; Shapiro, R., p. 677).

But they did not show that "Wed-Lok" had "a fanciful meaning." Instead, their testimony showed they gave to the word "Wed-Lok" only formal lip service and that their real interest began and ended with the descriptive word "lock" (R., pp. 419-420, 473, 488-489, 499-500, 508-513, 528-529, 545-546, 561, 582, 600, 623, 639-640, 642-643, 659, 677, 694-696, 701-704, 706-710, 712-721).

Thus, their testimony ties in only with Granat's claim to the right to monopolize "lock." But even on this score they show only a descriptive use of the word.

Jacoby defined the significance of "Lok" as used in one of his advertisements as indicating "that they lock together, snap together" (R., p. 450). And to him the mark described "the mechanism; the mechanical part" (R., p. 467).

Kernis testified (R., p. 642):

> "Q. You mentioned the fact that you considered the word 'Lok' an important part of the trade-mark. Will you explain why you consider it an important part of the trade-mark?
>
> "A. *I think it is the only way, myself, that I could identify the feature of both rings locking together,* and not being able to turn away from one another.

> "Q. Would you say that the trade-mark 'Wed-Lok' characterizes the type of ring that is sold under that mark?
>
> "A. Characterizes the type of ring? *I think it signifies that a locking feature is involved in there.*"

And Shapiro thought that "lock" was "the most important part" of "Wed-Lok" (R., p. 706).

And the Patent Office consistently has registered marks containing "Lock" *if the other part* of the mark were sufficiently distinctive. Thirty-nine of these other marks, of which ten are in the same field as "Wed-Lok," have been introduced here (Dfts' Ex.37), and the book—"Trade Marks of the Jewelry and Kindred Trades"—(Dfts' Ex.38) contains thirteen additional "lock" marks. "Lock" is purely descriptive and is a commonly used and non-distinctive minor component of many marks which take whatever trade mark virtue they possess from the *other* components.

As a mere part of a trade mark—"lock" is entirely without significance or distinction. Pertinent to this, but concerning words far more fanciful than "lock," are two recent decisions of this Court: *John Morrell & Co.* v. *Hauser Packing Co.,* 20 F.2d 713; *Van Camp Sea Food Co.* v. *Westgate Sea Products Co.,* 28 F.2d 957.

In the *Morrell* case, plaintiff's trade mark comprised the word "Pride" in combination with another word, such as "Morrell's Pride." Speaking of plaintiff's mark this Court said (20 F.2d 714):

> "In the combination as actually used, and as registered, both words are given equal prominence, and to ignore one would be quite as arbitrary as to ignore the other. Both in the Patent Office and on the market, plaintiff declared its trade-mark to be, not 'Pride,' but

'Morrell's Pride,' or some other combination. Under such circumstances, the trade-mark must be deemed to consist of the combination."

In the *Van Camp* case, this Court, referring to the mark "Chicken of the Sea" said (28 F.2d 958):

"Moreover, 'chicken,' as used by the plaintiff, is not a purely fanciful term, but is measurably descriptive. * * *

"But, in view of the considerations just suggested, appellant cannot, as in effect it seeks to do, abandon all but the word 'chicken' and claim that as its trade-mark. * * * That terms merely descriptive of quality cannot be appropriated as trade-marks is too well settled to require citation of authorities. On the point that generally a registered trade-mark is to be considered as an entirety, see John Morrell & Co. v. Hauser Packing Co. (C.C.A.) 20 F.(2d) 713; * * *."

So also, *Green* v. *Ludford Fruit Products* (D.C.S.D.Cal. C.D.), 39 F. Supp. 985, 988, appeal dismissed (C.C.A. 9th Cir.), 126 F.2d 468; *Caron Corporation* v. *Ollendorff* (C.C.A. 2d Cir.), 160 F.2d 444; *Rosenberg* v. *Shakeproof Lock Washer Co.* (D.C.Del.), 20 F. Supp. 959, aff'd (C.C.A. 3d Cir.), 100 F.2d 811, 812; *Dixi-Cola Laboratories* v. *Coca-Cola Co.* (C.C.A. 4th Cir.), 117 F.2d, 352, 359, c.d., 314 U. S. 629; *Steem-Electric Corp.* v. *Herzfeld-Phillipson Co.* (C.C.A. 7th Cir.), 118 F.2d 122, 127.

To summarize, Granat's advertising and Granat's customer-witnesses show that "Wed-Lok" was used descriptively. Such a use is the antithesis of the "fanciful" use essential to give basis to a secondary meaning. And "Wed-Lok" has been used so spasmodically as to negative secondary meaning even if other factors were propitious to the creation of such meaning.

"Wed-Lok" has failed to make the grade as a technical common-law trade mark. It has failed to show any of the characteristics of secondary meaning. It, therefore, is invalid.

The common word "lock" has never had other than a descriptive significance and possesses not a single attribute of secondary meaning.

"Feature Lock" Does Not Infringe "Wed-Lok"

The "Restatement of the Law of Torts" states (Vol. III, §728):

> "The ultimate test of whether or not there is a confusing similarity between a designation and a legal trade-mark or trade name which it is alleged to infringe is *the effect in the market* in which they are used. In some cases the probable effect can be determined by a mere comparison of the designation with the trade-mark or trade name. In other cases extrinsic evidence may be necessary. In any event, the issue is whether an appreciable number of prospective purchasers of the goods or services in connection with which the designation and the trade-mark or trade name are used *are likely to regard them as indicating the same source.*"

The facts here show there was no "appreciable number of prospective purchasers" of "Wed-Lok" or of "Feature Lock" who were "likely to regard them as indicating the same source."

On this score, the District Court found (a) "That the words 'Feature Lock' are sufficiently distinct from 'Wed-Lok' *as to preclude likelihood* that the Feature Ring Co.'s product will be passed off as those of plaintiff"—and (b) that "The evidence fails to show confusion in the ultimate customers" (No. 12407, p. 40).

Despite these findings, Granat repetitiously urges the "doctrine of 'confusion of source'" (Gr. Br., pp. 14-16, 26-38, 42-43, 48-49, 68) saying "that ultimate purchasers might believe that the goods trade-marked 'FEATURE LOCK' were in some fashion sponsored by the appellant [Granat]" (Gr. Br., p. 35).

In the development of this doctrine Granat quotes again and again from the decision of this Court in the *Stork* case, 166 F.2d 348 (Gr. Br., pp. 14-16, 29-31, 33-34, 35, 39, 42-43).*

The doctrine of "confusion of source," as shown by this Court's decision in the *Stork* case (166 F.2d 356-357), is primarily applicable to those cases where the parties are *not* in competition. In essence, it forbids the imitation of a trade-mark used, not for the purpose of diverting trade from the owner to the imitator, but for the purpose of securing for the imitator the owner's good will.

In the instant case, however, the parties are in direct competition** and the usual rule in such cases prevails.

A good statement of this rule, quoted by this Court in the *Stork* case (166 F.2d 354) from *Hanover Milling Co.* v. *Metcalf,* 240 U. S. 403, 412-413, is as follows:

> "Courts afford redress or relief upon the ground that a party has a valuable interest in the good will of his trade or business, and in the trade-marks adopted to

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* Feature does not disagree with one word of the decision in the *Stork* case. The facts there, however, have little in common with those here, and thus in many of its facets, it is entirely irrelevant to the present controversy.

** Despite the allegation in the complaint that the parties were competitive (No. 12407, p. 5, Par. XII) and Feature's admission of this allegation (No. 12407, p. 15, Par. 12), and despite the fact the entire hearing was on the basis of competition Granat has devoted fourteen pages of its brief (pp. 56-69) to a review of the law where the parties are *not* in competition.

> maintain and extend it. The essence of the wrong consists in the sale of the goods of one manufacturer or vendor for those of another."

The "Restatement" is simply a paraphrase of this statement. And here, there has been neither sale nor the likelihood of sale of the goods of Feature for those of Granat. Nor is there anything here indicating that purchasers believed, or might have believed, "that the goods trademarked 'FEATURE LOCK' were in some fashion sponsored by [Granat]." To give even a semblance of a showing on this charge Granat is compelled to rely on a perversion of the District's Court's findings, and, once again, on the parroting of its retailers.

(a) With respect to the Court's findings, Granat's thesis is (Gr. Br., p. 21):

> "The major premises relied upon by the District Court in refusing relief to appellant are that the appellant failed to establish that apellees had palmed off their goods as those of appellant, and that appellant failed to establish confusion in ultimate customers between the products of appellant and appellees" (see also, pp. 21-26, 56).

Granat fails entirely to acknowledge the Court's equally important finding that "Feature Lock" was "sufficiently distinct from 'Wed-Lok' as to preclude *likelihood*" of passing off. Thus, going beyond Granat's statements, the Court not only found that there was no confusion, but that there was no likelihood of confusion. Yet, on the inaccurate premise that the District Court had found *only* that there was no palming off and no confusion, Granat draws the conclusion that failure to show injury is not fatal to an action of this nature, again quoting from the *Stork* case (Gr. Br., p. 23). Feature does not contest the proposition of law, but for it to be applicable, as this

Court noted in the *Stork* case (166 F.2d 359), there must be a likelihood of deception; and here, the District Court specifically found there was no such likelihood.

(b) With respect to its retailers, Granat says (Gr. Br., pp. 26-27):

> "For example, the witnesses Jacoby (R. 446-447), Jackson (R. 474), Goldblatt (R. 508-509), Navarro (R. 582-583) and Shapiro (R. 569-595) each testified that they were confused as to the source of the 'FEATURE LOCK' rings when said rings first came to their attention and that they thought these rings were a product of Granat Bros., the appellant herein."

Analysis of the testimony of these witnesses makes perfectly plain that they either did not understand the word "confused" or that they volitionally misused it.

All five of them, like a parade of Charlie McCarthys, stated they thought only of Granat Bros. when they first saw or heard of "Feature Lock" (R., pp. 446-447, 474, 488, 506-507, 512-513, 544-546, 562-563, 572-573, 593, 694-695, 707-709). But they did not *confuse* "Feature Lock" with "Wed-Lok."

Jacoby had only to "hear of the word 'Lock' either spelled L-o-k or L-o-c-k" to "think of Granat Bros." (R., pp. 419-420).

And Jackson said (R., p. 488):

> "Well, when I heard the word 'Lock' all I had ever heard of was Wed-Lok, so naturally I thought it was a Granat ring."

But Jackson admitted that before he heard of "Feature Lock" he knew there were other locking type rings *not* made by Granat, for, he said, he had "had customers coming in and asking [him] about different lock rings,

which [he] didn't know about until this all come up here recently" (R., p. 490).

Similarly, Shapiro "felt that any ring that would be named 'lock' was a Granat product" (R., p. 694). But on cross-examination (R., p. 707) he confessed that "I, as a jeweler, as an expert, could tell [the difference between 'Feature Lock' and 'Wed-Lok']."

Granat's other customer-witnesses are no more convincing. For instance, Goldblatt, asserting confusion, reduced it to infinity with the statement (R., p. 507):

> "In fact, to the best of my recollection I asked the party who presented the rings to me if they were made by Granat Manufacturing Company *and he assured me that they were not.*"

And Navarro protested he was "confused" in the face of his admission (R., p. 593) that the salesman who tried to sell him "Feature Lock"—

> "told me they had something *better than Granat*, or something like that, I don't know how it was, immediately I thought that *someone* was trying to make *the same thing as Granat*. That is the impression I got."

Another customer of Granat, Kleiger, was no more adroit, for when he first saw the advertising on this Feature Lok ring—"*I believe it was in one of the trade journals*"— he *still* thought of Granat (R., p. 545). But those advertisements prominently displayed the name "Feature Ring Co. of New York" (Dfts' Exs. 7, 10, 30, 34; Pl's Exs. G, I, J), and if he saw the advertisement he also saw the name of the advertiser.

"There is none so blind as they that won't see."

The three remaining customer-witnesses of Granat were even less cooperative to the "confusion" pipe dream.

Gamler was asked (R., p. 667):

> "When you first heard of the Feature Lok line did you believe that it was a product of Granat Brothers?"

to which he made the only spontaneous answer of any of these witnesses:

> "When I saw the ring I knew it wasn't *because it was marked Feature Lok.*"

And the testimony brought out that Kernis was a customer of Feature Ring Company and that Van Sipma handled other lock type rings (R., pp. 624-603), so Granat *never raised the issue of confusion.*

So much for plaintiff's nine hand-picked customer-witnesses.

And Granat's officers didn't do any better. On deposition, Mr. Joseph Granat and Mr. Wineroth claimed knowledge of confusion (Dfts' Ex. 40: p. 121; see also, pp. 121-128; Dfts' Ex. 40; p. 176; see also, pp. 176-180), but neither made any effort to *prove* any of these asserted instances, and at the hearing the matter was not adverted to in any way.

On the other side of the picture there is considerable evidence that there was *no* confusion, and, in fact, that there could have been no confusion.

Mr. Lawrence McCune, who, as counsel for the Northern California Wholesale Jewelers Association (R., p. 380) was in an unequalled position to learn of confusion, if any there were, never heard of such a thing (R., pp. 381-382). On the same score, Mr. Bloch, one of the defendants and a distributor of "Feature Lock" testified (R., pp. 389-390):

> "There has never been a question of confusion brought to my attention in the two names whatsoever. I have never heard of it. I have never had a customer

> so inform me, nor have I seen that. * * * 90 per cent of our customers are personal friends of mine, and I hear from them on a lot of things besides business, and I am sure they would write me or tell me about any confusion that might exist."

Similarly, Mr. Magoon, a retail jeweler, had never heard of any confusion (R., p. 408). And no suggestion of confusion has come home to Feature Ring Company (R., p. 326), or to anyone else (Dfts' Ex. 39: pp. 68, 78, 85, 91-92).

Finally on this phase of the case, Granat says (Gr. Br., pp. 28-29):

> "Both Feature Ring Co., Inc. and Samuel H. Friend knew that the adoption of the trade-mark 'FEATURE LOCK' was the adoption of a trade-mark confusingly similar to appellant's trade-mark 'WED LOK' and that there would be resultant 'confusion of source', trade-mark infringement and unfair competition."

In asserted support of this charge, Granat relies on isolated statements of Mr. Bloch and of Mr. Peterson—both taken out of context.

Mr. Bloch's statement that he anticipated litigation was made with relation to a letter he had received from a customer stating, "we are afraid to advertise it ['Feature Lock'] because of the suit Granat instituted against you and another dealer" (R., p. 396). And more than three months earlier than that Granat had sent its first letters charging infringement (Dfts' Exs. 18, 19; R., pp. 297-300). Thus "coming events [had already] cast their shadows before."

And the testimony of Mr. Peterson affords even less basis for Granat's charge. Granat's counsel started to ask one question—i. e., "your dealer was confused as to who manufactured Dovetail Lock—" —and wound up with

an entirely different one,—i. e., "Dovetail Lock is not of your manufacture?"—and this latter question *only* the witness answered. The balance of the correspondence to which reference was being made clearly disclosed that neither Feature's dealer nor Mr. Peterson was confused (R., pp. 339-341).

The testimony here contains no believable evidence of confusion.

An analysis of the facts in the light of the comprehensive test set up by the "Restatement" demonstrates there was not the vaguest *likelihood* of confusion.

Section 729 lists the factors which go to show infringement or noninfringement as follows:

"Factors in Confusing Similarity.

"In determining whether the actor's designation is confusingly similar to the other's trade-mark or trade name, the following factors are important:

"(a) the degree of similarity between the designation and the trade-mark or trade name in

"(i) appearance;

"(ii) pronunciation of the words used;

"(iii) verbal translation of the pictures or designs involved;

"(iv) suggestion;

"(b) the intent of the actor in adopting the designation;

"(c) the relation in use and manner of marketing between the goods or services marketed by the actor and those marketed by the other;

"(d) the degree of care likely to be exercised by purchaser."

The facts, in so far as they have not already been adverted to, may be marshalled under the topic headings of the "Restatement":

(a)(i): *Dis*similarity in appearance. "Wed-Lok" is a hyphenated word of six letters. "Feature Lock" is two separate words of eleven letters; and the shape of the letters of "Wed" is unlike the shape of the letters of "Feature." "Wed-Lok" is written in a light flowing script in a single line. "Feature Lock" is written in a much heavier script at an angle to the horizontal.

(ii) *Dis*similarity in pronunciation. The descriptive word "lock" is pronounced, of course, like the corrupted word "Lok"; the dominant word "Feature," however, possesses no vaguest similarity of sound to the word "Wed."

(iii) (Not applicable here).

(iv) *Dis*similarity in suggestion. "Wed-Lok" describes the product, a locking wedding and engagement ensemble. "Feature Lock" on the other hand, suggests that a lock of some sort is involved, but the only suggestion conveyed by the word "Feature" is that those familiar with Feature Ring Company might think of that company.

(b) The intent of Feature in adopting its mark. The name "Feature Lock" was adopted with full knowledge of the prior existence of "Wed-Lok" (R., pp. 261-262, 264-269). The facts are stated by Mr. Peterson (R., pp. 267-269):

> "I knew that they ['Wed-Lok'] were Granat products, yes, sir, I did. And I made a point to make sure that whatever trade-mark I used for my product would in no way infringe, in any way whatsoever, or impair the product of any other manufacturer, regardless of what it was, whether it was Granat or anyone else. There is plenty of room in this country for everyone to con-

duct their business on a legitimate, legal basis, and consequently I used that word 'Lock' because I thought I had a perfect right to use it, *to describe my product.* * * * We have a reputation of our own to consider, and we base it directly on our own representation and our reputation for doing business, and I think it is just as good as Granat Bros.'" (see also, pp. 264-269, 283-284, 332, 378.)

Acting with this foreknowledge, Feature has done every single thing it could to avoid the slightest possibility of confusion (cf., R., p. 332). Every one of its trade journal advertisements—with which the jewelers generally are familiar—bore its corporate name in prominent form (Dfts' Exs. 10, 14-16; R., pp. 270-271, 285-292), and every product going to a jeweler went "In envelopes bearing 'Feature Rings' or 'Feature Ring Co.'" and the rings themselves were stamped "F.L.Patented" (R., pp. 319-320; 324-326).

While, in accord with custom, the distributor or retailer advertising did not contain the name "Feature Ring Co." (R., pp. 294-295, 319, 392, 408), it did, in almost every instance, contain a description of the product and diagrams disclosing the method of operation—which in itself clearly distinguished "Feature Lock" from any other locking ring (R., pp. 323-325).

And even though Granat invokes the rule that the amount of advertising is an element to be taken into consideration (Gr. Br., p. 14), it is to be noted that the District Court found that Granat "from the year 1934 to the present" had spent, exclusive of dealer advertising, approximately $153,000 (No. 12407, p. 40) or an average of less than $10,000 per year for the sixteen year period; whereas, in contrast, Feature, in the ten *months'* period—May 1948 to March 10, 1949—spent, also exclusive of dealer advertising, about $100,000 (R., pp. 315-316). Certainly the highly con-

centrated advertising of Feature could only have been undertaken with the intent of creating a public consciousness of "Feature Lock" rings. This is the opposite of "reaping where one has not sown" or of "riding the coattails of a senior appropriator" (cf., the *Stork* case, 166 F. 2d 357).

(c) The relation in use and manner of marketing of "Wed-Lok" and "Feature Lock." As indicated before, the parties here *are* in competition (ante, p. 25).

(d) The degree of care of purchasers. Purchasers here are of two classes: the middleman—i.e., the jewelry retailer, and the ultimate consumer—i.e., the man who buys the rings for his girl or the girl who wears them. There is not a suggestion in this record that any of the latter class was confused. The burden of the testimony is that this class does not give a hoot about the name (ante, pp. 7-9). And that the middleman has never been confused has been made fully apparent (ante, pp. 27-30). Beyond this, the product itself is such that both classes purchase discriminatingly and with care.

It is submitted, therefore, that not a single element requisite to a showing of infringement is here present.

Feature Has Not Unfairly Competed With Granat

The facts upon which Granat bases its claim that Feature has unfairly competed are broadly coextensive with those on which its relies to show trade mark infringement, and generally it uses those terms conjunctively (Gr. Br., pp. 25, 29, 38, 56-57). One possible projection of Granat's claim is found in its assertion that Feature "encouraged its distributors to use the word 'Lock' in connection with the sale of its product by said distributors" (Gr. Br.,

p. 41) and that "The adoption of these additional names* has resulted in a 'hemming in' of appellant with confusingly similar names on identical goods"—citing in support of this thesis, *Stork Restaurant* v. *Marcus* (D. C. E. D. Pa.), 36 F. Supp. 90 (Gr. Br., p. 42).

It is true that Feature gave its customers the alternative of "the registered name Feature Lock or their own brand name" (Dfts' Exs. 10, 14; see also, R., pp. 301-302, 320, 350), but since they were outright purchasers they had the right, so far as Feature was concerned, to adopt any name they liked.

Of greater importance here is the fact that the only similarity of any of these marks to "Wed-Lok" is in the use of the descriptive word "lock" to describe a lock. This is not an infringement of a trade mark and it is not unfair competition. Granat is complaining at the expected result of the normal competitive process. It is being no more "hemmed in" because others use the word "lock" than Gruen is being "hemmed in" when Bulova or Longines use the word "watch."

And the Pennsylvania *Stork* case affords no basis for Granat's contentions. That case, in substance, is indistinguishable from this Court's *Stork* case. In both cases the defendant had copied plaintiff's trade name and had substantially copied its insignia. Upon the basis of this cardinal fact both Courts, *unlike the District Court here,* determined there *was* likelihood of confusion. In the Pennsylvania case the Court noted that while this confusion was likely to be local (36 F. Supp. 94) it was not insubstantial enough to warrant application of the *de minimis* rule. It is in this connection that the statement quoted by Granat (Gr. Br., p. 42) was used. Obviously, it has no application here.

---

* Cupid Lock—Rhapsody Lock—Love Lock—Treasure Lock—Life Lok — Duo-Lock — Lucky Lock — Eterna Lock — Bridalok—Heart Lock (R., pp. 140-141).

Since there is no trade mark infringement and no evidence of passing off or of the likelihood of passing off, there is nothing in this record on which a charge of unfair competition against Feature may be based.

Granat's Harassment of Feature's Customers is Unfair Competition.

When Feature entered the market with its locking wedding and engagement ring sets Granat immediately undertook its campaign of threats against Feature's customers. These threats overnight became a very real coercion, leading to the refusal by the retail jewelers to place orders and to the cancellation of orders already placed. The facts with respect to this campaign are as follows:

On April 8, 1948 Granat's then-counsel wrote Kay Jewelers asserting the use of "Tru-Lock" was an infringement (R., pp. 297-300; Dfts' Ex. 18). This was followed on April 19th by a similar claim against Zale's Jewelers, based on their use of "Feature-Lok" (Dfts' Ex. 19; see also, R., p. 335). In July, Friend and Morgan & Allen were notified (Dfts' Exs. 20, 21), and then, assumedly as soon as they were heard of, notices went to a large number of jewelers all over the United States (R., pp. 138-142; Pl's Ex. P; Dfts' Exs. 18-29).

It is significant that despite Granat's knowledge of Feature's operation as early as May 1948 (cf., R., p. 142), *it chose to harass Feature's customers but has never sent any notice to Feature* (R., pp. 296-297).

Among those who have been notified—most of them customers of Feature (R., pp. 349-361), are the sponsors of "Cupid Lock"—of "Dovetail Lock"—of "Rhapsody Lock"—of "Love Lock"—of "Treasure Lock"—of "Life Lock"—of "Duo-Lock"—of "Lucky Lock"—of "Eterna Lock"—of "Bridalok"—and of "Heart Lock" (R., pp. 140-142; Pl's Ex. P; Dfts' Exs. 18-29).

And the sole determinant of whether a concern would be notified was whether it used the word "lock" to describe a locking type ring. Clearly no attempt was made to determine whether the *entire* trade mark bore any similarity to "Wed-Lok" (R., pp. 136-142; Dfts' Ex. 40: pp. 70-75).

Granat followed up its threats by instituting these and other actions. But the average retail jeweler is unable to afford the luxury of litigation, and had Feature *not* undertaken the defense of its customers (R., pp. 308-310, 342; Dfts' Ex. 30) many would have done what Kay Jewelers did do—that is, consent to the entry of a decree (R., pp. 205-207; Pl's Ex. TT). However, even after the notices and the institution of litigation, Granat was not content to stop. Instead, it circularized the industry with the following letter:

> "You are undoubtedly aware that there are now being marketed several types of ring sets with names that are confusingly like Wed-Lok. Since you are a Wed-Lok dealer and one of our customers, we want you to know that where these rings are infringements on Wed-Lok rings patents and trademarks, we are taking and will continue to take the necessary legal steps which cases of this kind justify.
>
> "You will be interested to know that suit has been brought by Granat Bros. against S. H. Friend, San Francisco wholesaler, and Herbert Brown, Salinas, California retailer, alleging that the trade name 'Feature-Lock' infringes the Granat Bros. trademark, Wed-Lok. Suit has also been brought by Granat Bros. against Kay Jewelry Co., in Los Angeles, alleging that the trade name 'Tru-Lock' infringes the Granat Bros. trademark, Wed-Lok.
>
> "You may be sure that everything that is legally proper is being done to protect you as a Wed-Lok dealer from unfair competition" (Dfts' Ex. 40:15).

Feature immediately felt the effects of this campaign. Mr. Peterson described the situation which arose (R., p. 297):

> "This plaintiff was sending letters to all my customers threatening them with suit.
>
> "Mr. Mellin: All of them?
>
> "The Witness: Well I say 'all'. I don't know how many actually, but a good many of them. To me it seemed as if it was all, because all I got was long distance call after call, letter after letter, people becoming panicky that they had better stop using the trade-mark Feature Lock, otherwise they intended to sue them.
>
> "Q. (By Mr. Mellin): The letters said that, you mean?
>
> "A. Words to that effect. I don't exactly know the wording, but it was a threatening sort of letter. It led most of my customers to call me up or write me asking what to do."

Feature was forced to offer to assume the defense of these customers and to save them harmless (Dfts' Exs. 22-24). This, however, did not meet the situation and Feature further was compelled to advertise in substantially all of the trade journals that—

> "We will defend and hold harmless any customer of Feature Ring Company, Inc., who is sued, threatened or otherwise harassed for his use of our mark 'Feature Lock' on our rings" (Dfts' Ex. 30; R., pp. 308-309).

Even this was not enough. The customers were afraid to become in any way involved (R., pp. 341-342). Their quite natural reaction is shown in the following:

Maurice Stamper, a customer of Feature, testified (Dfts' Ex. 39: p. 74):

> "I was not prepared to jeopardize my business in any way, either through bad publicity which a type of suit such as that would cause, or if your suit was successful, the liability that might result. I had no idea just to what extent I would be liable to Granat Bros. in the event that a successful suit was started by Granat Bros. As a result I called off an advertising program that I had started for continuation throughout the year and the beginning of this year of 'Eterna Lock' in all the magazines.
>
> "As a result we lost the benefit of the publicity we could have given it and the assistance that my salesmen would have received in the selling of the product. That was my standpoint."

To the same effect, Charles Barnett said (Dfts' Ex. 39: pp. 83-84):

> "* * * in some instances our customers refused to buy the Feature Ring product because they heard of objections or lawsuits, or what-have-you, against Feature * * *
>
> "In one instance after the goods were sold, about $1200 worth, he cancelled it out because he didn't want to take the chance."

Another customer, Ed. Cain & Co., on October 1, 1948, wrote to Feature (Dfts' Ex. 29):

> "A number of our customers who have the other lines of lock sets in and have advertised them, have received letters from the attorneys of Granat, advising them that they are liable in a suit for infringement * * *."

On October 20, 1948, the same customer wrote (Dfts' Ex. 29):

> "Upon the advice of our attorneys we have returned to you on the date of October 15th the Feature Lock ring sets for credit, in view of the threatening atmosphere that seems to be developing through the Central West, regarding the rights and patents. Until the situation is clarified, we will be unable to use this merchandise at this writing."

A credit memorandum was duly issued (Dfts' Ex. 29).

Still another customer—Kay Jewelers of Los Angeles, consented to the entry of a decree enjoining it from using the word "Tru-Lock" (R., pp. 205-206; Pl's Ex. TT).

The actuality of Feature's loss is shown. The full amount of it can be shown only by an accounting.

The courts are not in entire agreement as to the rule to be applied in matters of this sort. Certain of the cases seem to take the position that while a court will protect against the bad faith efforts of a patent or trade mark owner, the real proof of such bad faith is found primarily in that owner's failure to follow up its threats with suit. One of the most striking cases of this sort is the very recent decision (May 5, 1950) of the Court of Appeals for the Second Circuit in *Kaplan* v. *Helenhart Novelty Corp.*, —— F.2d ——, 85 U.S.P.Q. 285.

That was an action for declaratory judgment instituted by a party which had been threatened and which sought to have the patent in issue declared invalid or not infringed, to have an accounting of profits and damages due to the misuse, and to have the patent owner enjoined from further misuse. The District Court granted an injunction and the Court of Appeals reversed because of its determination that there was "no substantial evidence to show that the defendants did not and do not reasonably believe that

their patent is valid and has been infringed as they have asserted" (85 U.S.P.Q. 288). The Court went on to note that "the only evidence of bad faith is the defendants' failure to sue promptly"—but, said the Court, this in itself was vitiated because under the Declaratory Judgment Act the threatened party, as soon as threatened, "had a plain and complete remedy for any wrong done them" (85 U.S.P.Q. 288).

Even that case, however, was qualified in several particulars which are here important. There, plaintiff had notified the real defendant (85 U.S.P.Q. 286) and had not, as here, restricted its campaign to small customers of that defendant. And there, the patent in suit was "presumptively valid" (85 U.S.P.Q. 288). Here, to the contrary, Granat's predecessor and Granat had undertaken to register "Wedlock" and "Wed-Lok" under the Act of 1905, where the presumption of validity is indulged. Registration had been denied because the marks were descriptive and thus invalid. The applicants in each case had acquiesced in this decision of the Patent Office and had amended their applications to bring them under the Act of 1920. And there exists no presumption of validity of marks registered under the 1920 Act (*Armstrong Co.* v. *Nu-Enamel Corp.,* 305 U. S. 315, 322-324, 333).

In the *Kaplan* case the Second Circuit not only adverted to the presumptive validity of the patent but also to the fact that "the allegations of infringement do not appear to be frivolous" (85 U.S.P.Q. 288). Here, however, such allegations clearly are frivolous. For, in sending out its notices and commencing its suits it failed entirely to apply the basic rule applicable in the case of infringement of a valid trade mark; that is, that the infringement is to be judged by the over-all similarity of the mark taken as a whole (*Beckwith* v. *Commr. of Patents,* 252 U. S. 538, 545-546; *Van Camp Sea Food Co.* v. *Westgate Sea Products Co.* (C.C.A. 9th Cir.), 28 F.2d 957, 958). Instead, entirely

without regard to the striking dissimilarity of the dominant word of the marks (compare, for example, "Feature" or "Rhapsody" or "Treasure" with "Wed"), Granat undertook to monopolize to itself all uses of the word "lock" to describe a lock.

In the *Van Camp Sea Food Co.* v. *Cohn-Hopkins* case this Court said (56 F.2d 799):

> "That descriptive names cannot be monopolized in a trade-mark is too well settled to require discussion."

Many of the courts have not, as does the Court of Appeals for the Second Circuit, emphasized so strongly the institution of action as a proof of good faith. The matter is regarded simply as one where, if bad faith is shown, relief follows. Thus, in *E. Edelmann & Co.* v. *Triple-A Specialty Co.* (C.C.A. 7th Cir.), 88 F.2d 852, 854, the Court affirmed the lower court in holding for plaintiff in an action for declaratory judgment and for damages for unfair competition based upon the circulation of charges of infringement.

That same court, in an earlier case—*Racine Paper Goods Co.* v. *Dittgen,* 171 Fed. 631, said (p. 633):

> "Undoubtedly, one claiming that his patent is being infringed should take steps to advise the public of his rights as provided by statute, provided, however, that if it is made to appear that under pretense of so doing he is pursuing a course which is calculated to unnecessarily injure another's business, and with the plain intention of so doing, his conduct will be deemed malicious, and he brings himself within the rule of law obtaining in cases of unfair competition in trade, and subject to injunction * * *."
>
> "In other words, it requires no prolonged or extensive series of damaging assaults upon one's business to call into service the restraining hand of the law, provided

it satisfactorily appears that the acts are done with the purpose of injuring the business, and have injured and are calculated to injure it. When this is proven, fraud will be implied."

To the same effect, the Court of Appeals for the Third Circuit in *A. B. Farquhar Co.* v. *National Harrow Co.*, 102 Fed. 714, said (p. 715):

"Where notices are given or circulars distributed in good faith to warn against infringement, no wrong whatever is committed; but where, as is here averred, they are not made or issued with such intent, but in bad faith, and solely for the purpose of destroying the business of another, a very different case is presented. In such a case property rights are fraudulently assailed, and a court of chancery, whose interposition is invoked for their protection, should not refuse to accord it."

And the rule of these cases is embodied in the "Restatement of Torts," which provides (§674):

"One who initiates or procures the initiation of civil proceedings against another is liable to him for the harm done thereby, if

(a) the proceedings are initiated

(i) without probable cause, and

(ii) primarily for a purpose other than that of securing the adjudication of the claim on which the proceedings are based, and

(b) except where they are ex parte, the proceedings have terminated in favor of the person against whom they are brought."

Granat's action in sending notices of infringement and in initiating the actions which it did are so entirely without

legal basis as to show its entire course of action to be "without probable cause" and "primarily for a purpose other than that of securing the adjudication of the claim."

This conclusion is strengthened by the letters broadcast to the industry by Granat which could have served no informative purpose and which could only have been for the purpose of widening the scope of the intimidation.

Conclusion

Granat's trade mark "Wed-Lok" is palpably invalid. It has no attribute of secondary meaning. And even if valid and if it had a secondary meaning, Feature has not infringed or unfairly competed.

Granat's campaign against small wholesalers and retailers, and its careful avoidance of a direct challenge to Feature Ring Company, goes beyond the limits of a good-faith assertion of a cause of action and has occasioned great damage and loss to Feature.

The District Court should be affirmed in its holding that Feature has not infringed and is not guilty of unfair competition.

The District Court should be reversed in its holding that Granat's trade mark "Wed-Lok" is a distinctive and valid trade mark and in its holding that Granat has not unfairly competed with Feature.

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Dated: July 3, 1950.

Nos. 12,407 and 12,408

IN THE

United States Court of Appeals

For the Ninth Circuit

SAMUEL H. FRIEND, et al., *Appellants,* vs. GRANAT BROS. (a corporation), *Appellee.*	No. 12,407
GRANAT BROS. (a corporation), *Appellant,* vs. SAMUEL H. FRIEND, et al., *Appellees.*	(CONSOLIDATED CASES)
HERBERT BROWN, et al., *Appellants,* vs. GRANAT BROS. (a corporation), *Appellee.*	No. 12,408
GRANAT BROS. (a corporation), *Appellant,* vs. HERBERT BROWN, et al., *Appellees.*	

REPLY BRIEF ON BEHALF OF APPELLANT, GRANAT BROS.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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Nos. 12,407 and 12,408

IN THE

United States Court of Appeals

For the Ninth Circuit

SAMUEL H. FRIEND, et al., *Appellants,* vs. GRANAT BROS. (a corporation), *Appellee.*	No. 12,407
GRANAT BROS. (a corporation), *Appellant,* vs. SAMUEL H. FRIEND, et al., *Appellees.*	(CONSOLIDATED CASES)
HERBERT BROWN, et al., *Appellants,* vs. GRANAT BROS. (a corporation), *Appellee.*	No. 12,408
GRANAT BROS. (a corporation), *Appellant,* vs. HERBERT BROWN, et al., *Appellees.*	

REPLY BRIEF ON BEHALF OF APPELLANT, GRANAT BROS.

THE DEFENDANTS' BRIEF UNDER THE TITLE, STATEMENT OF THE CASE, AND ELSEWHERE THROUGHOUT THE BRIEF, DISTORTS THE TRUE FACTS OF THIS CASE IN A SHOCKING MANNER.

Re: "Suggestive" versus "descriptive".

The defendants,* on page 2 of their brief, attack Finding of Fact No. VIII which was made by the District Court and which states:

> " 'Plaintiff's trade-mark "Wed-Lock" is not primarily descriptive of the ring ensembles marketed and sold by plaintiff, but it is used in a suggestive or figurative sense and is a valid registered trade-mark.' "

as not being supported by the evidence.

The District Court made the above finding after hearing a tremendous amount of testimony and reviewing voluminous documentary evidence in this case and it reached the only conclusion it could reach under the law of trade-marks; namely, that the trade-mark "WED LOK" is merely suggestive of a wedding-engagement ring ensemble and not descriptive thereof. Fundamentally, the word "wedlock" is commonly used to describe a state of matrimony, and when the trade-mark "WED LOK" is employed in connection with a ring ensemble, it suggests to the ordinary person that said ring ensemble relates to weddings or wedding rings. The trade-mark "WED LOK", as viewed by anyone who purchases such a

*In appellant's opening brief the parties were designated in the customary manner of appellant and appellees. However, appellees in their reply brief have designated the parties as the plaintiff and defendant and as this brief is an answering brief we will follow this latter procedure.

trade-mark ring, can only have such a suggestive or figurative meaning, as found by the District Court. The facts as presented to the District Court fully support this finding and pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, and the application of that rule in the recent Ninth Circuit case of *Ralph Brodie Co. v. Hydraulic Press Mfg. Co.,* 151 Fed. (2d) 91, the finding of the District Court must stand because said finding is not clearly erroneous or unsupported by the facts.

Re: "Secondary meaning".

Plaintiff, on page 5 of its brief, again misstates the facts where it says, "no showing of secondary meaning was made" with respect to plaintiff's trade-mark "WED LOK".

The District Court in refusing to enter a specific finding of secondary meaning with respect to plaintiff's trade-mark "WED LOK" was in error because the plaintiff presented to the District Court a tremendous amount of evidence establishing secondary meaning. In fact, secondary meaning is fully established by the Court's own findings as follows:

> "VI. That plaintiff applied the trade-mark 'Wed-Lok' to finger rings and wedding ensembles and said finger rings and wedding ring ensembles were sold in interstate commerce over the entire United States by plaintiff continuously since at least the year 1936."
>
> "IX. That plaintiff has been the exclusive user of the trade-mark 'Wed-Lok' continuously since at least the year 1936."

"X. That plaintiff made extensive sales of its products trade-marked 'Wed-Lok' throughout the entire United States from the year 1934 to date, and such sales in the trade-marked products were in the amount of approximately Three Million Dollars ($3,000,000.00)."*

"XI. That plaintiff's trade-marked products, 'Wed-Lok' and the trade-mark 'Wed-Lok' have been widely and very extensively advertised throughout the United States from the year 1934 to the present, excluding the war years of 1942, 1943, 1944 and 1945; and such advertising, exclusive of extensive dealer advertising, cost approximately One Hundred Fifty Three Thousand Dollars ($153,000.00)."

"XII. That in addition to plaintiff's advertising of trade-mark products 'Wed-Lok' plaintiff's dealers throughout the United States extensively advertised them in local papers."†

As to evidence upon which those findings were based, the Court is referred to Exhibits Y, Z and AA, which point out the distributors, dealers and territories covered by plaintiff's "WED LOK" customers.

As to the evidence of the tremendous dollar value of the advertising of "WED LOK" products, the

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*Exhibit Z discloses that "WED LOK" rings were sold in 212 towns, 37 states and Territory of Hawaii by 615 dealers during period 1934 to 1941, inclusive.

Exhibit AA discloses that "WED LOK" rings were sold in 602 towns, 47 states and Territory of Hawaii and Washington, D. C. by 1069 dealers during year 1947 to August, 1948.

†A summary of the law of secondary meaning is set forth in Appendix A.

Court is referred to Exhibits EEE and FFF (R. 818-819). These exhibits refer solely to the advertising program of plaintiff and exclude the tremendous cost of advertising "WED LOK" rings by the hundreds of "WED LOK" dealers throughout the entire nation. Such a widespread advertising campaign can only result in familiarizing the public with plaintiff's "WED LOK" products and result in the development of a secondary meaning to the trade-mark "WED LOK" from which the public identifies "WED LOK" products as those of plaintiff's and plaintiff's alone.

It is submitted that there was not only more than ample evidence before the District Court to justify a finding of secondary meaning with respect to plaintiff's trade-mark but no evidence to the contrary, and consequently the District Court committed error in not so finding. (See assignment of error by Granat No. 10, page 7 of opening brief.)

Re: Defendants attempt to distort the record with reference to plaintiff's advertising of "WED LOK".

On page 6 of defendants' brief an attempt has been made to mislead this Court with reference to the advertising practice of plaintiff in connection with its trade-mark "WED LOK". Although it is distasteful to plaintiff to accuse the defendants of attempting to mislead this Court, the misstatements made by defendants cannot go unchallenged. Defendants stated, on said page 6, that "Granat adduced no records of advertising expenditures * * * indeed, it seems purposefully to have avoided this * * *" Just how the defendants attempt to support this statement by the record

references contained within the statement in the brief is unexplainable because the record references referred to by the defendants prove the opposite.

The first record reference made by the defendants is to the testimony of Mr. Wineroth (R. 183-186) wherein he affirmatively states that during the years 1934 to 1941 Granat Bros. appropriated three percent (3%) of their total sales to advertising the products of Granat Bros., and of this three percent (3%) fifty to sixty percent thereof was spent in advertising "WED LOK" rings, both directly by Granat and through dealers. This dollar amount was arrived at by proof (R. 178-179) of the Granat sales during that period.

The second reference made by defendants in "support" of their charge that no records of advertising and expenditures were submitted to this Court is to the testimony of Mr. Quick (R. 255-257). A review of this testimony by Mr. Quick discloses that compilations of advertising expenses were introduced by said witness and appear in the record as Exhibit EEE, which is reproduced at R. 818; and Exhibit FFF, which is reproduced at R. 819. It is also to be noted that defendants did not question the propriety of this evidence because they declined to cross-examine Mr. Quick. These two Exhibits, EEE and FFF, disclose that Granat Bros. spent thousands and thousands of dollars in advertising "WED LOK" products from 1943 to July of 1948.

Re: Distortion of the record as to "notice of infringement to customers".

Again on page 4 of their brief, defendants state that *they had about two hundred (200) distributors for their rings.** In the very next breath the defendants inferentially charge plaintiff *with notifying all users of the trade-mark "Lock"* with trade-mark infringement and unfair competition. *This is utterly false* for the fact is, and the record discloses, that in all, only twelve (12) notices of infringement were sent including those to defendant, Feature Ring Co., Inc.'s customers (R. 299-308 and R. 361). It must be remembered, in this respect, that a number of these twelve (12) notices were sent to persons who were not employing the mark "FEATURE LOCK" but were using other marks "hatched" from "FEATURE LOCK", such as "TRU-LOCK", "INVISIBLE LOCK", "ETERNA LOCK", "KIN-LOCK" and "MAGNOLIA LOCK". Thus, by the process of simple subtraction, not more than seven (7) customers using the trade-mark "FEATURE LOCK" of the Feature Ring Co., Inc. were notified of trade-mark infringement. *Suits were filed against three of said customers immediately after such notification.*

Re: Distortion of record as to the widespread use of "WED LOK".

Defendants again misstate the facts on page 19 of their brief when they attempt to have this Court believe that the trade-mark "WED LOK" was used

*All emphasis ours unless otherwise noted.

only to a small degree, and then spasmodically. The record discloses that there was no discontinuance of the use of the trade-mark "WED LOK" even during the war years (R. 252 to R. 254) (Exhibit DDD) and the District Court so found.* The witness, Quick (R. 252-253), established by documentary evidence (Exhibit DDD) that "WED LOK" rings were sold during the years 1941, 1942, 1943, 1944, 1945 and 1946. These rings were all stamped with the trade-mark "WED LOK" (R. 152).

Re: Distortion of record as to defendant Bloch's statement admitting he anticipated confusion of conflict between "WED LOK" and "FEATURE LOCK".

The statement contained on page 30 of defendants' brief with respect to Mr. Bloch's testimony of anticipated litigation having been made in connection to a letter he, Bloch, had received from a customer is absolutely false. The statement in the brief is:

> "Mr. Bloch's statement that he anticipated litigation was made with relation to a letter he had received from a customer stating, 'we are afraid to advertise it ("Feature Lock") because of the suit Granat instituted against you and another

---

*Finding VI.

"That plaintiff applied the trade-mark 'Wed-Lok' to finger rings and wedding ensembles and said finger rings and wedding ring ensembles were sold in interstate commerce over the entire United States by plaintiff continuously since at least the year 1936."

Finding XI.

"That plaintiff's trade-marked products, 'Wed-Lok' and the trade-mark 'Wed-Lok' have been widely and very extensively advertised throughout the United States from the year 1934 to the present, excluding the war years of 1942, 1943, 1944 and 1945; and such advertising, exclusive of extensive dealer advertising, cost approximately One Hundred Fifty Three Thousand Dollars ($153,000.00)."

dealer' (R. p. 396). And more than three months earlier than that Granat had sent its first letters charging infringement (Dfts' Exs. 18, 19; R. pp. 297-300). Thus 'coming events (had already) cast their shadows before.' "

That this statement is absolutely false and utterly contrary to the record is established by Mr. Bloch's testimony (R. 400) which unequivocally states:

"A. * * * *Most of the customers when I originally showed them the item,* I told them that if there was any question that we would back up—that the Feature Ring Co. would back them up.

Q. In other words, you anticipated that there would be trademark litigation?

A. Yes."

The utter futility of this statement in defendants' brief in attempting to minimize this tacit admission by defendant, Bloch, that he believed that concurrent use of "WED LOK" and "FEATURE LOCK" would cause confusion is established by simply correlating the above cited testimony with the previous testimony of Mr. Bloch, appearing at R. 387. At that point he testified that he first purchased "FEATURE LOCK" rings in January of 1948. Thus, he contacted his customers and prepared them for a complaint by Granat before Granat was aware of the infringement or had complained thereof *because the first notice of infringement was not sent out by plaintiff until April 9, 1948.* Thus, Bloch had been so advising his customers that a conflict was inevitable for months prior to any complaint by Granat and six months prior to the receipt of the letters from S. E. Needham for Bloch testified,

at R. 397, that the Needham letter was sent to him in late June.

Re: Distortion of plaintiff's act in circularizing its own customers.

On page 37 of defendants' brief *it charges that plaintiff circularized the industry* with a letter that they cleverly infer, although do not actually state, was a threat to defendant, Feature Ring Co., Inc.'s customers. *Actually this letter was sent only to plaintiff's own customers and was not a circularization of the jewelry industry.* The letter itself (Exhibit BB, R. 817)* so establishes and Mr. Wineroth so testified at R. 181-182 where he said:

> "Q. I show your letter which counsel referred to this morning as being sent as a circular letter dated August 13, 1948, and addressed to our customers, signed 'Granat Manufacturing Co.' Can you identify that letter?

---

*"Granat Manufacturing Company
114 Geary Street, San Francisco 8, California
August 13, 1948

To Our Customers:

You are undoubtedly aware that there are now being marketed several types of ring sets with names that are confusingly like Wed-Lok. Since you are a Wed-Lok dealer and one of our customers, we want you to know that where these rings are infringements on Wed-Lok rings patents and trade-marks, we are taking and will continue to take the necessary legal steps which cases of this kind justify.

You will be interested to know that suit has been brought by Granat Bros. against S. H. Friend, San Francisco wholesaler and Herbert Brown, Salinas, California retailer, alleging that the trade name 'Feature Lock' infringes the Granat Bros. trade-mark, Wed-Lok. Suit has also been brought by Granat Bros. against Kay Jewelry Co., in Los Angeles, alleging that the trade name, 'Tru-Lock' infringes the Granat Bros. trademark Wed-Lok.

You may be sure that everything that is legally proper is being done to protect you as a Wed-Lok dealer from unfair competition.

Cordially yours,
"Granat Manufacturing Company"

A. Yes, this is the letter that was sent to our customers.

Q. Would you tell us, please, if they were sent to your customers as of your books at that time or a portion of them, or just in any abandon?

A. Oh, no, they were taken from our records, our books of customers who have bought our Wed Lok rings.

Q. Do you know the reason it was necessary that letter be written?

A. It seems to me at the time there was confusion on this thing.

Mr. Naylor. I didn't get your answer.

A. There seemed to be some confusion and our salesmen were writing in asking us what we were doing—their customers or our customers wanted to know from them what we were doing about the ads that were appearing—we speak of the Feature Lock ads that were appearing, and these customers wanted to know what we were going to do about them, and they asked our salesmen what we were going to do about that, and we thought the best way to handle it in one fell swoop was to write them a letter, even those that did not inquire, and let them know just how we felt about the matter."

Plaintiff, by this letter *to its own customers,* was merely attempting to answer the numerous inquiries directed to it by its customers with respect to what it was doing to stop the wanton infringement of the defendant, Feature Ring Co., Inc., and Feature Ring Co., Inc.'s various distributors and customers. There is full and sufficient evidence to sustain the District Court's Conclusion VIII (R. 42) (Case No. 12407):

"That the plaintiff has not unfairly competed with the defendant, Feature Ring Co., Inc.," and Conclusion IX (R. 19) (in Case No. 12408): "That plaintiff has not unfairly competed with defendant, Feature Ring Co., Inc., and Herbert Brown."

These particular points above discussed are only the most flagrant instances where defendants have attempted to misquote, misinterpret and misinform this Court as to the record facts of the instant litigation. Many more discrepancies are found in the brief, but space does not permit the discussion of all of the "errors" contained in defendants' brief.

PLAINTIFF'S TRADE-MARK "WED LOK" IS A VALID TRADE-MARK.

Contrary to defendants' contention and as affirmatively found by the District Court plaintiff's trade-mark is valid. The finding of the District Court in this respect is Finding VIII and states (R. 39:12407):

> "Plaintiff's trade-mark 'Wed-Lok' is not primarily descriptive of the ring ensembles marketed and sold by plaintiff, but it is used in a suggestive or figurative sense and is a valid registered trade-mark."

and Conclusion II (R. 41) which is based upon said Finding VIII wherein the District Court concluded:

> "That the trade-mark 'Wed-Lok' is a distinctive and valid trade-mark."

Both Finding VIII and Conclusion II are amply supported by the evidence and are based upon these uncontroverted facts:

1. Early adoption by plaintiff in 1934 of the trade-mark "WED LOK". (R. 91) (Finding V R. 39)

2. Continued and widespread use of the trade-mark "WED LOK" since 1936. (R. 167) (Finding X R. 39)

3. That the trade-mark "WED LOK" is suggestive and is used in a figurative sense. (Finding VIII) (Conclusion II)

4. That the plaintiff is engaged in the manufacture of finger rings and not "locks". (R. 88-89)

PLAINTIFF'S TRADE-MARK, IN ADDITION TO BEING A VALID TECHNICAL TRADE-MARK, HAS ACQUIRED A SECONDARY MEANING.

A secondary meaning attaches to a trade-mark by long, continued, widespread and exclusive use in commerce. The record discloses:

1. That plaintiff adopted its trade-mark "WED LOK" in 1934 and has had continuous and exclusive use of said trade-mark from 1936 to a period immediately preceding the filing of the complaint herein. (R. 204-205) (Findings IX and X)

2. Plaintiff's trade-marked products "WED LOK" from 1934 to 1941 were sold to six hun-

dred and fifteen (615) dealers in two hundred and twelve (212) towns located in thirty-seven (37) states and the Territory of Hawaii. (R. 172) (Exhibit Z R. 731)

3. Plaintiff's trade-marked products "WED LOK" as of 1947 were sold to one thousand and sixty-nine (1069) dealers in six hundred and two (602) towns located in forty-seven (47) states and the Territory of Hawaii and Washington, D. C. (R. 181) (Exhibit AA R. 762)

4. Plaintiff's trade-marked products "WED LOK" have been marked by having the said trade-mark "WED LOK" stamped on the inside of the rings. (R. 159)

5. Plaintiff's trade-marked products "WED LOK" have been extensively advertised throughout the United States. (See Exhibits DD, EE, FF and GG and Court's specific Finding XI, R. 40)

6. Plaintiff has expended in advertising its trade-mark "WED LOK" over One Hundred Fifty Three Thousand Dollars ($153,000.00). (R. 178-179, 183-186, 255-257; Finding XI, R. 40)

7. Since 1934 plaintiff has sold products trade-marked "WED LOK" of approximately Three Million Dollars ($3,000,000.00). (R. 178-179; Finding X, R. 39)

It is submitted, therefore, that the evidence is full and complete to show widespread and exclusive use of plaintiff's trade-marked products "WED LOK", and the ruling of the District Court that no secondary meaning has been established is clearly erroneous and contrary to the evidence and is entirely unsupported by the facts of this case as established by the evidence above set forth. A full discussion of the law of secondary meaning and its application to the instant case is found in Appendix A hereto.

DEFENDANTS HAVE INFRINGED PLAINTIFF'S TRADE-MARK BY USE OF THE TRADE-MARK "FEATURE LOCK" ON FINGER RINGS.

Defendants have in their brief failed to satisfactorily answer and overcome the fact of trade-mark infringement by their use of the trade-mark "FEATURE LOCK", and the Court is respectfully referred to the argument and law presented at pages 21 to 45 of its opening brief.

Defendants, in discussing non-infringement in their brief, sarcastically charge plaintiff's witnesses with being "Charlie McCarthys". We believe such sarcasm to be out of place. Plaintiff's witnesses that established confusion in the trade were substantial and representative jewelers throughout the United States and had been engaged in the jewelry business for many, many years. Said witnesses testified on the initial entry of "FEATURE LOCK" rings into the jewelry field,

and further testified to the long knowledge of plaintiff's trade-mark "WED LOK".

When it is remembered that the defendant, Feature Ring Co., Inc., knew of plaintiff's trade-mark "WED LOK" when it adopted its mark "FEATURE LOCK" for the identical products (R. 352), it goes far to establish the fact of trade-mark infringement. Such action on behalf of defendant recalls the following statement of Judge Garrecht in the *Stork Restaurant* case (166 Fed. (2d) 348, 361) where he said:

> " 'In Florence Mfg. Co. v. J. C. Dowd & Co., supra, 2 Cir., 178 F. at page 75, we find a classical statement of the principle: "It is so easy for the honest business man who wishes to sell his goods upon their merits, to select from the entire material universe, which is before him, symbols, marks and coverings which by no possibility can cause confusion between his goods and those of competitors, that the courts look with suspicion upon one who, in dressing his goods for the market, approaches so near to his successful rival that the public may fail to distinguish between them." ' "

It should also be noted that in a large percentage of Granat Bros. dealer advertising (to the public) the trade-mark "WED LOK" is identified with Granat Bros. which identifies the source of "WED LOK" rings. This is in contradistinction with the practice of the defendant, Feature Ring Co., Inc., wherein in its dealer advertisments (to the public) no mention is made of the source of the product sold under the trade-mark "FEATURE LOCK".

There is attached hereto appendix B which discusses the leading cases with respect to trade-mark infringement and also lists trade-marks that have been held to be confusingly similar to each other, all of which clearly indicate that the two trade-marks, "WED LOK" and "FEATURE LOCK", are confusingly similar. The Court's attention is respectfully directed to said appendix B.

CONCLUSION.

We respectfully submit that this Court find:

1. That plaintiff's trade-mark "WED LOK" is a distinctive and valid trade-mark.

2. That plaintiff's trade-mark "WED LOK", by its exclusive, extensive and long use, has acquired a secondary meaning.

3. That the trade-mark "FEATURE LOCK" used in connection with wedding ring ensembles is confusingly similar to plaintiff's trade-mark "WED LOK".

4. That there has been "confusion of source" respecting defendants' products in the customers of the wholesale business conducted by plaintiff.

5. That the result of the use of the trade-mark "FEATURE LOCK", and similar composite marks on defendants' products, has been a dilution, diminishing and lessening of the good will of the plaintiff, as represented by its trade-mark "WED LOK", and its investment in the sales and advertising thereof.

6. That defendants, and each of them, by the use of the trade-mark "FEATURE LOCK" upon wedding ring ensembles have infringed upon plaintiff's trade-mark rights and have unfairly competed with plaintiff.

Dated, San Francisco, California,
July 12, 1950.

MELLIN, HANSCOM & HURSH,
OSCAR A. MELLIN,
LEROY HANSCOM,
JACK E. HURSH,
Attorneys for Appellant,
Granat Bros.

(Appendices A and B Follow.)

Appendices A and B.

Appendix A

EVEN ASSUMING THAT THE TRADE-MARK "WED LOK" TO SOME EXTENT IS DESCRIPTIVE OF THE CHARACTER OF THE GOODS PLAINTIFF HAS PROVED A SECONDARY MEANING IN ACCORDANCE WITH THE AUTHORITIES BY A FAIR PREPONDERANCE OF THE EVIDENCE.

Secondary meaning may be presumed to exist where a name has been used so long and so extensively and exclusively that association with the product would naturally result. Obviously, secondary meaning is one of the most difficult kinds of evidence to procure, but direct evidence of what exists in the mind of the public is not required.

Judge Holmes, speaking for the Massachusetts court in *New England Awl & Needle Co. v. Marlborough Awl & Needle Co.,* 168 Mass. 154, 46 N.E. 386, stated:

> "The report states that it did not appear whether or not any purchaser of awls had learned to recognize the plaintiff's awls by the appearance of the packages. This cannot mean more than that there was no direct testimony to that effect. But the fact that the plaintiff had used the combination since 1885, and largely since 1893, is enough to raise a presumption in its favor."

Likewise, in the *Standard Oil* case with respect to the trade-mark "Standard" (*Standard Oil Company v. Michie,* 34 Fed. (2d) 802), it was held that more than thirty years' use of the word "Standard" had caused that word to be lifted from the public domain, and at least to fall in the twilight zone, as between evidence of the fact and judicial notice of the fact.

Where the only evidence of secondary meaning consists of proof of the length, extent and manner of use, all of these elements may be considered and have been held by the courts to be sufficient evidence of secondary meaning. In the following cases the evidence was held sufficient to prove secondary meaning:

Wisconsin Electric Co. v. Dumore Co., 35 Fed. (2d) 555, 557-558 (C.C.A. 6, 1929), 3 PQ 232. "Dumore" was granted protection as a secondary meaning mark.

> "Plaintiff has used it as a trade-mark since its organization in 1913. It has placed it on all its products, except on such of its small motors as it sold to other manufacturers. Plaintiff's gross business in the fourteen years of its existence has been more than $5,000,000. During the year 1926 it amounted to $1,132,000. About 65 per cent of this represented products to which the word 'Dumore' was applied. These products had acquired an enviable reputation for superior excellence and quality. * * * It advertises extensively in magazines and trade journals. For this advertising it has expended in the last few years more than $35,000 annually. The word 'Dumore' is always displayed in bold type in these advertisements. Their products are generally known in the trade as 'Dumore' products, and are advertised and called for as such by the retail trade."

Shaler Co. v. Rite-Way Products, Inc., 107 Fed. (2d) 82, 84 (C.C.A. 6, 1939), 43 PQ 425.

> "There was evidence and the court below found, that for many years the appellant had used the

words 'Hot Patches' extensively in connection with its merchandise; had spent large sums of money putting its product on the market; had established a nation-wide field of activity, accumulating numerous dealers in its products, and had introduced feature advertising stressing the words 'Hot Patches.'"

Miles Shoes v. Niles Bootery, 235 App. Div. 575, 257 NYS 790 (1932), 22 TM Rep. 407.

Use of a personal name for approximately eight years, and extensive advertising, established its secondary meaning.

Van Camp Sea Food Co., Inc. v. Packman Bros., 4 F. Supp. 522, 524 (D. C. D. N. J. 1933), 19 PQ 37.

Twenty years' use of the words "Chicken of the Sea" on canned tuna fish by the concern which made "the first use of the phrase in a manner to entitle anyone to its exclusive use" was sufficient evidence of secondary meaning.

General Shoe Corporation v. Rosen, 111 Fed. (2d) 95, 99 (C.C.A. 4, 1940), 45 PQ 196.

Extensive advertising and large sales during a period of more than fifteen years proved that the term "Friendly" had acquired secondary meaning.

To say the least, the sales distribution of "WED LOK" over the last fourteen (14) years throughout the entire United States, and in practically every city and hamlet thereof, as discussed in a previous chapter, plus the wide and extensive advertising of "WED LOK" over the same territory during the years, as also discussed in a previous paragraph, coupled with the testimony of the witnesses,* including the defendant Block, plus the completely exclusive use of the name "WED LOK" or anything confusingly similar thereto by Granat Bros. during the past fourteen (14) years, certainly presents a strong, if not a stronger case to prove secondary meaning in this peculiar field than the facts of the above cases.

We also call attention to the fact that retail customers asked the witnesses Jacoby (Defendants' Exhibit JJJ, R. 33), Jackson (Defendants' Exhibit KKK, R. 11), Goldblatt (Defendants' Exhibit LLL, R. 14), Kleiger (Defendants' Exhibit MMM, R. 21-22), Van Sipma (Defendants' Exhibit OOO, R. 25), Shapiro (Defendants' Exhibit RRR, R. 25, 33), Gamler (Defendants' Exhibit QQQ, R. 15-16), Navarro (Defendants' Exhibit NNN, R. 25), and Kernis (Defendants' Exhibit PPP, R. 34), for "WED LOK" by its trade-mark name.

The above matter is the only practical way of proving secondary meaning in this particular case, because usually one retail customer purchases but one wedding ring ensemble. We urge that it has been proved

*Deposition witnesses Jacoby, Jackson, Goldblatt, Kleiger, Navarro, Van Sipma, Kernis, Gamler and Shapiro.

in accordance with the above authorities by a fair preponderance of the evidence.

Although we believe "WED LOK" is a valid technical trade-mark, plaintiff is entitled to relief regardless of whether it is a valid technical trade-mark or not.

> 63 *Corpus Juris,* Section 101, pages 391, 392.
>
> "An exclusive proprietary interest such as a trade-mark or copyright, in the terms or symbols used to palm off the goods of one manufacturer or vendor as those of another, is not essential to the maintenance of a suit to enjoin or redress the perpetration of the wrong * * *. *Relief will be afforded regardless of whether or not the deceptive words or marks are valid technical trade-marks.* The cases are very numerous where relief has been afforded upon the ground of unfair competition against a deceptive use of generic or descriptive names and marks, personal geographical, corporate, and other names, *none of which are capable of exclusive appropriation as technical trade-marks.*"

Our Circuit Court of Appeals for the Ninth Circuit so ruled in *Stork Restaurant v. Sahati,* 166 Fed. (2d) 348, and they quoted the following rule with approval:

> "It is asserted by defendants that an absolute injunction will not be granted for the infringement of the right to use a word in what is called a 'secondary meaning' as distinguished from a technical trademark. Where words have acquired, as is established beyond dispute in this case, a fanciful meaning—a meaning that has no connection with their common meaning, it may be

more properly said that such meaning is their primary meaning in so far as their use in business is concerned. Their common meaning has dropped into the background. Otherwise no right to use them to the exclusion of others would have been acquired. *When, however, words have acquired such a sense and are the subject of the good will and reputation of a business which they designate, there is little if anything left to distinguish them from a trademark, a symbol, characters or words which have no common meaning and which are artificial, insofar as the scope of protection afforded to the one who has the prior right.*"

Straus v. Notaseme Hosiery Company, 36 S. Ct. 288, 289 (240 U.S. 179).

Plaintiff used "Notaseme", with rectangle containing black band running from left hand upper to right hand lower corner, the upper and lower panels on the two sides of the band being printed in red. "Notaseme" refused registration as trade-mark. Defendant used "Irontex" with practically same color and stripe combination.

Plaintiff sold seamless hosiery while defendant sold hose with seams.

"At the original hearing in the circuit court it was held that the plaintiff had embodied such a misrepresentation in the trademark as used that it would not be protected, and that unfair dealing was not made out. This decision was reversed by the circuit court of appeals on the ground that although the evidence did not show actual decep-

tion, the label used by the defendants so far resembled the plaintiff's that it would have deception as its natural result, and that the *plaintiff was entitled to relief whether the trademark on its label was good or bad as such.* 119 C.C.A. 134, 201 Fed. 99. The plaintiff was allowed to recover profits from a reasonable time after the defendants had notice of the similarity of the two designs, which was put at January 1, 1910. 209 Fed. 495, 131 C.C.A. 503, 215 Fed. 361.

"We agree with the circuit court that the plaintiff is not in a position to recover for an infringement of a registered trademark. The mark that it used held out to the public as registered in the Patent Office precisely the element that had been rejected there. It affirmed that the authority of the United States had sanctioned that for which that authority had been refused, and by grasping at too much lost all, so far as this case is concerned. Halzapfel's Compositions Co. v. Rathjen's American Composition Co., 183 U.S. 1, 8, 46 L. ed. 49, 53, 22 Sup. Ct. Rep. 6. The liability of the defendant must be derived from unfair competition if it exists.

"That it was unfair to continue the use of a label so similar in general character to the plaintiff's we are not disposed to deny."

Furniture Hospital v. Dorfman, 133 S.W. 861, 862 (K.C. Ct. of Appeals).

Suit to enjoin defendant from use of name "New York Furniture Hospital". Decision of lower Court sustaining demurrer reversed:

"There is no claim on the part of plaintiff that there has been a violation of a technical trade-mark, but that under the circumstances plaintiff has a right to designate his business by the name 'Furniture Hospital', and that defendant has no right to give his business such a similar designation as will enable him to deceive and mislead the public into thinking they are dealing with plaintiff. In other words, plaintiff claims that defendant is violating the rule against unfair competition which consists in passing off, or attempting to pass off, the goods *or business* of one person as and for the goods *or business* of another. In such case no exclusive proprietary interest in the trade name is necessary to relief, while in trade-mark cases an exclusive right is necessary, and this seems to be the principal distinction between the two. 38 Cyc. 763.

"Trade names are divided into exclusive and non-exclusive trade names. The former are protected upon the same principles that trade-marks are non-exclusive trade names, are such names as are publici juris; that is open to or exercisable by all persons in their primary sense, but which in a secondary sense have come to indicate the business of a particular trader. 38 Cyc. 765. The name which plaintiff in this case seeks to protect is that of a non-exclusive trade name in its secondary meaning."

Weiner v. National Tinsel Mfg. Co., 123 F. (2d) 96, 98 (C.C.A. 7).

Appeal from an order granting a preliminary injunction enjoining defendant from using "Tye-Ad-

String", "Ribbontye", any simulation of names "Print-Ad-String" and "Ribbonette" on similar goods. The defendant contended that the marks were descriptive and therefore invalid and in that connection the Court said:

> "Plaintiff's trade names having acquired a secondary meaning, their validity as registered trade-marks is immaterial to the instant question. Under such a situation, they have a common law right which they are entitled to have protected. In referring to the secondary-meaning doctrine, the court in Armstrong Co. v. Nu-Enamel Corp., 305 U.S. 315, 335, 59 S. Ct. 191, 201, 83 L. Ed. 195, said:
>
> " 'This establishes, entirely apart from any trade-mark act, the common law right of the Nu-Enamel Corporation to be free from the competitive use of these words as a trade-mark or trade name.' "

Western Auto Supply Co. v. Knox, 93 F. (2d) 850, 852 (C.C.A. 10).

"Confined to their primary meaning, geographical words and words which are merely descriptive of the merchandise are not capable of exclusive appropriation. But, where words of that character have been used so long and so exclusively by a trader or distributor with reference to his merchandise that they are generally understood to mean and denote such merchandise, they acquire a secondary meaning quite apart from their primary significance and he may restrain their perfidious use by another if it causes deceit and injures his business."

Landers, Frary & Clark v. Universal Cooler Corp., 85 F. (2d) 46, 48 (C.C.A. 2).

Suit to enjoin defendant from use of word "Universal" on electric refrigerators; plaintiff selling cabinets for same articles under name of "Universal Cooler".

> "The suggestion has at times also been made that the doctrine does not apply to a mark which is not coined, and it is on this that the defendant apparently relies. (Citing cases.) We do not agree; so far as France v. Washburn-Crosby Co., supra, says anything to the contrary, it was obiter. It is quite true that, just as a coined word is easier to protect than a word of common speech upon goods on which the owner has used it, so it is easier to prevent its use upon other kinds of goods. The proprietary connotation,—'secondary meaning',—of a word of common speech is harder to create and easier to lose, and its fringe or penumbra does not usually extend so far as that of a coined word. But that is matter of proof and of that alone; if the owner can in fact show that the fringe does extend to other goods there is no reason why his interest should not be recognized. His interest is exactly the same as though the mark were a coined word (his reputation and his chance to extend his sales); and while the plagiarist has a better excuse because the law recognizes that all have an interest in the free use of the language, the conflict is between the same interests as when the owner seeks to protect the name upon goods which he has sold. It would therefore be wrong to make any absolute distinction between coined, and colloquial, names."

Standard Oil Co. v. Michie, 34 F. (2d) 802, 803-804 (D.C., E.D. Missouri).

"There was much evidence that the name 'Standard', or that word when used in connection with the gasoline and lubricating oils business, has been lifted from the public domain and has taken on a secondary meaning, as wholly applicable to plaintiff and its business, and that the word 'Standard' is generally understood, in such business, as referring to plaintiff's goods." (Italics Court's.)

* * * * * * *

"If plaintiff by more than 30 years' use of the word 'Standard' has caused this word to be lifted from the public domain, and to be applied and understood in the oil business as designating its business, and its gasoline and oils, then no one has the right to use this word in such wise as to cause confusion among customers. Not only does the proof show such lifting of the word 'Standard' from the public domain, but the situation is such as at least to fall in the twilight zone, as between evidence of the fact and judicial notice of the fact."

George La Monte & Son v. Quayle & Son Corporation, et al., 33 Fed. Supp. 481 (D.C., N.D. New York).

Suit for trade-mark and unfair competition. Plaintiff is owner of trade-mark "Safety Check" for use on safety paper. The defendant is also manufacturer and seller of paper using identical name. The defendant moved to dismiss on the ground that "Safety Check" is a mere descriptive term and is not a valid

trade-mark. In denying defendant's motion to dismiss, the Court said:

> "The defendants cite numerous decisions holding that words merely descriptive of characteristics of the product are not the subject of the trade-mark and cannot become the subject of a monopoly by any manufacturer of such goods. In other words, that no mere descriptive term can be a valid trade-mark.
>
> "If this were merely a suit for infringement of trade-mark, the defendant's position would be strong.
>
> "But this is also a suit for unfair competition and the weight of authority is that if such descriptive words, though not constituting a valid trade-mark, have been used so long, so extensively and so exclusively by a manufacturer who has used these words as a supposed trade-mark as to identify such words with his product and thereby indicate the origin of the goods, in such case the words acquire a secondary meaning and will support an action for unfair competition against one or more competitors who fraudulently use the same or like words to deceive the public into believing his or their goods are the goods long made by the manufacturer using the words as claimed trade-mark."

Hudson Tire Co., Inc. v. Hudson Tire & Rubber Corporation, et al., 276 Fed. 59, 60-61 (D.C. S.D. New York).

Defendant enjoined from using word "Hudson" on tires.

"I think the word 'Hudson', as applied to tires and cords, had obtained a secondary meaning referable to complainant's merchandise, and the fact that defendants had secured a corporate name from the state of New York did not authorize them to use it in connection with such merchandise."

Holeproof Hosiery Co. v. Wallach Bros., 172 Fed. 859, 860 (C.C.A. 2).

Defendant enjoined from use of word "Holeproof" on stockings.

"Nor do we find any particular force in the objection that the word is descriptive. The record, as it now stands, sufficiently indicates that by expensive advertising, and large sales during several years the word 'Holeproof' has acquired a secondary meaning, indicating to the prospective purchaser, not that socks sold under it are indestructible, but that they are those which complainant has been making and supply to consumers, apparently to their entire satisfaction."

New York World's Fair 1939 v. World's Fair News, 297 N.Y.S. 923.

Plaintiff was organized to plan and operate World's Fair, having its own publication World's Fair Bulletin. Defendant was the publisher of a magazine under its own name as above. Defendant enjoined from use of words "World's Fair".

"The defendants contend that the words 'World's Fair' are generic or descriptive words

which any person may use. The well established rule is, however, that such words or names may acquire a secondary meaning entitling them to protection."

If plaintiff proves that the name or word has been so exclusively identified with his goods or business as to have acquired a secondary meaning so as to indicate his goods or business, and his alone, he is entitled to relief against another's use of such mark in a trade-mark sense.

Le Blume Import Co., Inc. v. Coty, et al. (C.C.A. 2, 1923), 293 Fed. 344.

"For it is entirely clear that, if a word which in its primary sense is descriptive has nevertheless been used so long or so exclusively in a particular market by a particular dealer that his product in that market and to its purchasing public has come to mean that the article in connection with which the word is used is the product of a particular producer, it acquires a secondary meaning, which is indicative of the manufacturer and the excellence of the thing produced, and enables the manufacturer to assert an exclusive right in the word. Nims on Unfair Competition and Trade-Marks (2d Ed.) § 37."

Words which have a primary meaning of their own, such as words descriptive of the goods or a quality or character of the goods, which were not capable of exclusive appropriation as a trade-mark originally

or at the time of its adoption, may nevertheless by long use in connection with the goods or business of a particular trader come to be understood by the public as designating the goods or business of that particular trader. Such a word has a secondary meaning and it may not be used in a trade-mark sense by a competitor.

G. & C. Merriam Co. v. Saalfield (C.C.A. 6, 1912), 198 Fed. 369.

"* * * It contemplates that a word or phrase originally, and in that sense primarily, incapable of exclusive appropriation with reference to an article on the market, because geographically or otherwise descriptive, might nevertheless have been used so long and so exclusively by one producer with reference to his article that, in that trade and to that branch of the purchasing public, the word or phrase had come to mean that the article was his product; in other words, had come to be, to them, his trade-mark. * * *"

See also:

Coca-Cola Co. v. Koke Co., 254 U.S. 143, 41 S. Ct. 113;

American Lead Pencil Co. v. L. Gottlieb & Sons (C.C. S.D. N.Y.), 181 Fed. 178;

Pinaud, Inc. v. Huebschman (D.C. N.Y.), 27 Fed. (2d) 531 (affirmed 27 Fed. (2d) 538).

Appendix B

IN ORDER TO CONSTITUTE TRADE-MARK INFRINGEMENT THE COURTS HAVE HELD IT IS NOT NECESSARY THAT THE TRADE-MARK BE LITERALLY COPIED OR THAT BOTH WORDS OF A COMBINATION TRADE-MARK BE USED. SIMILARITY IS SUFFICIENT IF THE SIMILARITY IS SUCH AS MIGHT CAUSE CONFUSION IN THE TRADE.

The Courts, including our Court of Appeals, have frequently held composite trade-marks to be infringed where but one part of the conflicting marks is similar and that part is a word found in the dictionary, and in some instances suggestive of the characteristic of the product.

There are three relatively recent cases (the last in 1941), by three different District Courts (California, Michigan and Missouri) of the United States directly in point with the case at bar, which involve the same composite trade-mark "Miracle Whip". This mark seems more suggestive of a characteristic of mayonnaise than the word "WED LOK" is suggestive of the characteristic of a wedding ring ensemble. In one of those cases the District Court found as a fact that manufacturers had described the whipped salad dressing previously as being a "whipped" product.

In these three cases, the first held that "Wonder Whip" was confusingly similar to "Miracle Whip" *(Kraft-Phenix Cheese Corporation v. Goldfarb, et al.* (D.C. Calif.), 7 F. Supp. 199).

In the second case, which was in Michigan, "Wonder Mix" was held confusingly similar to "Miracle

Whip" *(Kraft-Phenix Cheese Corp. v. R. E. Robertson, Inc.* (D.C. Mich), 9 F. Supp. 125).

In the third case "Salad Whip" was held confusingly similar to "Miracle Whip" *(Kraft Cheese Co. v. Leston Co.,* 43 F. Supp. 782 (1941)).

We submit that the above three cases and the facts thereof are parallel to the case at bar.

Also directly in point are the "Celotex" cases:

"Fir-Tex" confusingly similar to "Celotex":

Celotex Co. v. Millington, 49 Fed. (2d) 1053.

"Flametex" confusingly similar to "Celotex":

Celotex Co. v. Bronston Bros. & Co., 49 Fed. (2d) 1048.

"Opal-Tex" confusingly similar to "Celotex":

Celotex Co. v. Chicago Panel-Stone Co., 49 Fed. (2d) 1051.

This Court, in the case of *N. K. Fairbank Co. v. Luckel, King & Cake Soap Co.,* 102 Fed. 327 (C.C.A. 9, May 7, 1900), held that the trade-mark "Gold Dust" was infringed by the name "Gold Drop", despite the fact that entire dissimlar labels were adopted by the infringer. In discussing the question of infringement, the Court said:

> "This is a suit in equity. It was instituted to restrain the infringement of the trade-mark or trade-name 'Gold Dust', used to designate a washing powder manufactured and sold on the market by appellant. The alleged infringement consists of the use of the name 'Gold Drop' to designate a washing powder manufactured and sold by appellee. * * *

"The testimony shows that respondent at the time it commenced the manufacture of its washing powder 'Gold Drop' was well aware of the existence of complainant's 'Gold Dust', and that it had been extensively and expensively advertised in Oregon as well as in other states; * * *

"The law is well settled that in suits of this character the intention of the respondent in adopting the style of package, or choosing a name for a similar product, is to a certain extent immaterial. It is not essential to the right of complainant to an injunction to show absolute fraud or willful intent on the part of the respondent. Upon familiar principles, it will be presumed that the respondent contemplated the natural consequences of its own acts. If the acts of respondent in the adoption of the name 'Gold Drop' constituted an infringement of the trade-mark or trade-name of the complainant, and it was put on the market in such a manner as to interfere with the legal rights of complainant, to its loss and injury, it would be entitled to an injunction, irrespective of the question of any testimony as to actual fraud or willful intent. The Court must determine the intent from respondent's acts and the results produced thereby. R. Henisch & Sons v. Boker (C.C.), 86 Fed. 766, 769.

"* * * It must constantly be borne in mind that there are two kinds of trade-marks—one of peculiar pictures, labels, or symbols; the other in the use of a name. The infringement charged herein is in the adoption by the respondent of both the trade-name and trade-mark. So far as the name 'Gold Dust' is concerned, the dissimi-

larity of the labels, size of packages, and character of symbols can make no essential difference. As was said in Hier v. Abrahams, 82 N. Y. 519, 525:

" 'The trade-mark consisted in the word simply, and the plaintiffs might have printed it on any form of label they might fancy, without losing the protection of the law. The defendants had no right to adopt it by merely putting it on a label of different fashion from that which the plaintiffs had been in the habit of using.'

* * * * * * *

"The trade-name differs from the trade-mark in this: that one appeals to the ear more than to the eye. The advertisements of the name were for the purpose of having the intended purchaser ask for 'Gold Dust' without his having any knowledge of the character of the label on the package he was to receive, and in this sense the fact that the infringer of the name used different devices and symbols would have no great force. The imitation of the name 'Gold Dust', by which the soap or washing powder of complainant was known, would constitute an infringement, because purchasers would be liable to be misled who had no knowledge of the article except the advertised name as being the best soap or washing powder in the market. It is not unusual for a certain specific article advertised extensively, of reputed excellence, to become publicly known and called for by the name which is more readily retained in the memory. This is one of the reasons why respondent selected the name 'Gold Drop',—'on account of its being short; good for advertising, and easy to remember.' "

Other decisions of like import are as follows:

"Rugfoam" confusingly similar to "Fabrikfoam":

Ex parte West Disinfecting Company, 64 U.S. P.Q. 489.

"Black and Tan" confusingly similar to "Black and White":

Harris v. Plough Chemical Co., 54 Fed. (2d) 967.

"Brest O'Chicken" confusingly similar to "Chicken of the Sea":

Van Camp Sea Food Co. v. Westgate Sea Products Co., 48 Fed. (2d) 950.

"Butter-Cream" confusingly similar to "Butter-Nut" and "Butter-Krust":

Nafziger v. Schulze Baking Co., 46 App. D.C. 292.

"Canned Light" confusingly similar to "Barreled Sunlight":

Boydell Bros. White Lead & Color Co. v. U. S. Gutta Percha Paint Co., 57 App. D.C. 308, 22 Fed. (2d) 1006.

"Chero-Cola" confusingly similar to "Coca-Cola":

Coca-Cola Co. v. Chero-Cola Co., 511 App. D.C. 27, 273 Fed. 755.

"Coal-O-Matic" confusingly similar to "Oil-O-Matic":

Cross v. Williams Oil-O-Matic Heating Corporation, 48 Fed. (2d) 659.

"Dainty Maid" confusingly similar to "Lady Dainty":

McLellan Stores Co. v. Conrad & Co., 57 App. D.C. 176, 18 Fed. (2d) 826.

"Dri-Shod" confusingly similar to "Dry-Socks":

F. P. Kirkendall & Co. v. Mayer Boot & Shoe Co., 47 App. D.C. 245.

"Foot Preserver" confusingly similar to "Arch Preserver":

Trustees for Arch Preserver Shoe Patents v. James McCreery & Co., 49 Fed. (2d) 1068.

"Lemon Frost" confusingly similar to "Jack Frost":

In re Coca-Cola Bottling Co. of Los Angeles, 49 Fed. (2d) 838.

"Permanize" confusingly similar to "Simoniz":

Simoniz Co. v. Permanizing Stations of America, 49 Fed. (2d) 846.

"Peroxogen" confusingly similar to "Dioxogen":

Bookman v. Oakland Chemical Co., 40 Fed. (2d) 1006.

"Property Life Insurance" confusingly similar to "Surface Insurance Policy Products":

Baltimore Paint & Color Works v. Bennett Glass & Paint Co., 40 Fed. (2d) 1009.

"Public Safety Bond" confusingly similar to "Public Service Bond":

Harlem-Card & Paper Co. v. Taylor-Loan Co., Papermakers, 56 App. D.C. 149, 10 Fed. (2d) 1014.

"Ray-O-Lite" confusingly similar to "Prest-O-Lite":

French Battery & Carbon Co. v. Prest-O-Lite Co., 49 App. D.C. 373, 265 Fed. 1013.

"Redleaf" confusingly similar to "Redfern":

John Wanamaker, Philadelphia v. Warner Bros. Co., 59 App. D.C. 284, 29 Fed. (2d) 872.

"Rocklath" confusingly similar to "Locklath":

U. S. Gypsum Co. v. Plastoid Products, 46 Fed. (2d) 580.

"Seal-O-Meter" confusingly similar to "Mail-O-Meter":

International Postal Supply Co. v. Pitney-Bowes Postage Meter Co., 38 Fed. (2d) 692.

"Suncrush" confusingly similar to "Orange Crush" and "Lemon Crush":

Orange Crush Co. v. California Crushed Fruit Co., 54 App. D.C. 313, 297 Fed. 892.

"Velvetina" confusingly similar to "Velvelite":

Goodrich Drug Co. v. Cassada Mfg. Co., 46 App. D.C. 146.

"Wheat-Nut" confusingly similar to "Grape-Nuts":

Postum Cereal Co. v. Farmers' Mill & Elevator Ass'n, 58 App. D.C. 73, 24 Fed. (2d) 901.

"White Chicken" confusingly similar to "Chicken of the Sea":

Van Camp Sea Food Co. v. Alexander B. Stewart Organizations, 50 Fed. (2d) 976.

"White Lily" confusingly similar to "Lily White":

R. H. Macy & Co. v. New York Grocery Co., 50 App. D.C. 105, 267 Fed. 749.

"White Magic" confusingly similar to "Magic Marvel":

Broderick v. L. Mitchell & Co., 53 App. D.C. 220, 289 Fed. 618.

"Edelweiss-Maltine" confusingly similar to "Maltine":

Peter Schoenhofen Brewing Co. v. Maltine Co., 30 App. D.C. 346.

"Chancellor Club" confusingly similar to "Club Cocktails":

In re S. C. Herbst Importing Co., 30 App. D.C. 297.

"Amber Bead" confusingly similar to "Amber":

In re Independent Breweries Co., 39 App. D.C. 118.

"Ace of Clubs" confusingly similar to "Ace Hy":

Miller Becker Co. v. King of Clubs, 56 Fed. (2d) 883.

Also in point are:

American Lead Pencil Co. v. L. Gottlieb & Sons, 181 Fed. 178 (C.C., S.D. N.Y., July 22, 1910).

"* * * I have no difficulty in finding that the phrase 'Knoxall' is an infringement of the phrase 'Beats-All'. There is no such limitation as the defendant puts upon the infringement of a trademark; i.e., that the similarity must go only to

the eye or ear. The question cannot be treated in any such technical manner, for always the substantial question is whether the defendant is likely to steal the complainant's trade by the use of the trade-mark in question. I am quite satisfied in this case that there is such similarity between the two phrases as would readily lead in the mind of customers to confusion; a case in point is the infringement of 'Keepclean' by 'Sta Kleen'. Florence Manfacturing Company v. J. C Dowd & Co. (C.C.A.), 178 Fed. 73. There ar many other decisions in the books which shov that it is not alone similarity to the ear or ey which constitutes infringement."

Elliott Varnish Co. v. Sears, Roebuck & Co.
221 Fed. 797 (D.C., N.D., Illinois, E. D
March 26, 1915).

"This is a suit brought on a registered trade mark for 'Roof Leak'. * * * Defendant, a mai order house in Chicago, Ill., is selling a roof pain under the name of 'Never Leak', and this is al leged to be an infringement.

* * * * * *

"I think the trade-mark is valid, under th cases cited in Hopkins on Trade-Marks, 9(among which the following have been sustained 'Cream', referring to baking powder; 'Snov flake', referring to crackers or bread; 'Ant Washboard', suggesting soap; 'Bacco Curo' an 'No To Bac'; 'Baffle', referring to safes; 'Bal of a Thousand Flowers', a cosmetic; 'Slate', roof paint; and 'Swandown', a face powder.

" 'Never Leak' obviously suggests the sam idea as 'Roof Leak', when applied to a paint, ar I think it is an undoubted infringement."

In a case involving wedding rings, the mark "Diamond Blossom" was held confusingly similar to "Orange Blossom" *(Traub Mfg. Co. v. R. Harris & Co.,* 53 Fed. (2d) 416).

We therefore respectfully urge, under the facts of the case at bar, that the word "FEATURE LOCK", being used on identical goods after fourteen (14) years of exclusive use of the word "WED LOK" by plaintiff and with the obvious effect of diluting, diminishing and whittling away plaintiff's rights under such mark, constitutes an infringement thereof in complete accord with the above authorities.

No. 12411

United States
Court of Appeals
for the Ninth Circuit.

WALTER FRANCIS JOHN SHELLEY,

Petitioner,

vs.

UNITED STATES OF AMERICA RAILROAD RETIREMENT BOARD,

Respondent.

Appendix to Brief of Respondent
[Excerpts from Transcript of Record]

Petition For Review of Decision of the United States of America Railroad Retirement Board.

FILED

JUN 16 1950

PAUL P. O'BRIEN,

CLERK

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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(Excerpts from Transcript of Record)

Petition For Review of Decision of the United States of America Railroad Retirement Board.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

258 North Avenue 49
Los Angeles, Cal.
November 14, 1936;

The United States Railroad Retirement Board
Washington D. C.
Gentlemen:—

* * *

They turned me off in 1931, after promising me that when times improved, I would be reemployed and allowed all my seniority rights. This they have never done, always saying that either I was too slow, or there was no place where I could be used. They expected me to turn out as many bills on the typewriter as men 30 years my junior could turn out. I made on an average about 390 in the eight hours, but nothing satisfies this corporation.

* * *

/s/ W. FRANK SHELLEY.

Los Angeles, Cal.
December 8th, 1936;

The Railroad Retirement Board,
Washington, D. C.
Gentlemen:—

* * *

I put in 34 years in the service of the Southern Pacific, giving them the very best years of my life. Then, when I was injured in their service, and could not work as fast as younger men, they laid me off, promising me to be called for duty,

which I have always been willing and anxious to respond to, but which they always claimed there were no vacancies as yet.

* * *

The letter of Mr. Paul Shoup, President of the S. P. shows how they deceived me, he "hoping I would soon be back on the job etc." which they never had any true intention of doing. No wonder people hate railroads for their treatment of their employees.

Yours respectfully,

/s/ W. FRANK J. SHELLEY.

Paul Shoup
President.

Southern Pacific Company
65 Market St. San Francisco

June 26, 1931;

Mr. W. Frank Shelley
258 N. Ave 49 Los Angeles
Dear Mr. Shelley:

* * *

It has since developed that a man with greater senority than yours has exercised his choice on the position formerly assigned to you, which has resulted in placing you on our laid-off list. Under these circumstances, therefore, it has been necessary for us to cancel the annual Pass which you have held as Agent.

* * *

With reference to your company Life Insurance, I regret also that there is no way in which we can take care of this feature for you.

APPLICATION FOR ANNUITY

Date Signed January 7, 1937.

.7. Are you now actually working for a railroad or other carrier? Have no employment.

8. If not, give the date you last worked. S. U. Frt. Station Los Angeles 1932;

/s/ WALTER F. J. SHELLEY.

Officially Filed Jan. 11, 1937. Railroad Retirement Board.

---

1. Name of RR or other Carrier:
   Southern Pacific Company:
2. Last occupation Stenographer & Typist:
   Date began svc. 1930.
3. Dept. opn Freight House SP Co
   Los Angeles, Cal.
   Date ended service 1932.
4. Exact name on pay roll W. F. Shelley.

I had to lay off few days account slight sickness. When I wanted to come back, they said I was too slow on the typewriter, and then said another man had bid in my place who had more seniorty on the Clerks Seniority list.

I made 380 bills a day, but this was "too slow," and at my age after giving the Southern Pacific practically all my life's service, 40 years service to them, they evaded, and side stepped, and did not put me back to work, but left me to starve for all they cared, but said when times got better I would be sent for. They never sent.

They cancelled my Annual Pass; my Insurance; and all my rights, although I had many years Seniority on the Order of Railroad Telegraphers List, which Union I was member in good standing. I also joined the Brotherhood of Railroad Clerks, and was in good standing there.

* * *

/s/ WALTER F. J. SHELLEY.

Questionnaire

1. (a) Have you worked for a railroad or other carrier since August 28, 1935 and received pay for such work?—(a) No.

2. If you have not worked for a railroad or other carrier for pay since August 28, 1935:
   (a) Reason for your being on leave or furlough.—(a) S.P. would not give me work.
   (b) If not on leave or furlough, what has been your relation to your former employer since August 28, 1935?—(b) On leave.
   (c) On what date did you last work for a railroad or other carrier for pay?—(c) Fall of 1931 or 32.

3. (a) Have employees junior to you on the same roster or district worked since August 28, 1935?—(a) Yes indeed.
   (b) If so, why have you not worked?—(b) S.P. thought me too old.

February 9th 1937.

/s/ WALTER FRANCIS JOHN SHELLEY.

Form ERR-7

RAILROAD RETIREMENT BOARD

A-38554

Name of applicant Walter Francis Shelly.

Address 3753 Hellman Ave., Los Angeles, California.

Last Occupation Clerk.
Department of Division Los Angeles.
Name of Carrier Southern Pacific Company.
Was the above-named applicant On August 29, 1935,

(1) On furlough? No.

(2) On leave of absence? No.

(3) Absent on account of sickness or disability? No.

(4) Was he subject to call for service? No.

(6) What roster? Dropped after six months.

Remarks: Lost rights to return to service after being off six months. Last compensated service performed November 25, 1930.

I certify that the answers to the foregoing questions are true and correct to the best of my knowledge and belief.

Date November 22, 1937.

/s/ J. S. CUNNINGHAM,
Secretary Board of Pensions.

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258 North Avenue 49
Los Angeles, Cal.
January 28th, 1938

Mr. M. M. Wiggins,
Railroad Retirement Board,
Washington, D. C.

Dear Mr. Wiggins:

It seems extremely cruel to think that a man who has given the very best part of his life to a railroad should be deprived when he has grown old from any Pension because he is not in the service of a Carrier, however, one has to do the best possible under the circumstances.

If I went back to service for the Nevada Copper Belt Railroad, would this aid me in my quest for an annuity. I have in mind that the N.C.B. operates only in Nevada, so would appreciate it if you would kindly ascertain and advise me, as I have been unable to get on with my old employers the S.P. Railroad, and I think I can obtain work with

the N.C.B. and be called back, but don't want to do it if, it would be of no avail. Would the fact that it was not "Inter-State" make the service of no avail—

I feel determined to force my petition, and get my friends in Washington to help, if it be necessary, as I certainly worked fully 41 years, and I think a few years over that amount of time. I would appreciate it very much if you would mind finding out and advising me if I have put in sufficient time on the RR per your investigation of my application?

Thanking you for your kindly help to me, believe

Yours very truly,

/s/ WALTER F. J. SHELLEY.

VIRGINIA & TRUCKEE RAILWAY

Traffic Department

Carson City, Nevada

May 4, 1938.

M. E. Lynch Esq.,
Railroad Retirement Board.
Washington D. C.

Claim A-58554

My Dear Sir:—

I am pleased to advise that I have at last secured employment with the above named Railroad Company, and do Accounting work in the General

Office and auditing, as well as a little telegraphing, and some Shorthand work. I worked last month, and intend to stay if I can.

* * *

I claim I was in the service of the S.P. Company on August 29th, 1935 because I never resigned; tried continually to get back to work; was asked to resign saying there would be no work, but always refused, and said I was ready and willing to work, and would maintain this status. I am the subject of a conspiracy gotten up by a Jewish Assistant Superintendent who, by reason of jealousy, did his utmost to try and get me out of the service. He died a year or so ago, and he has gone to answer for the deeds done in the body to myself and many others, for he was the cruelest man ever on the Salt Lake Division of the Southern Pacific.

I constantly asked for work, and was always informed that "There's no chance; lots of men with more seniority—can't do anythng for you."

I was "bumped" by a man with more seniority in 1933, and I never resigned, nor can the S.P. produce any resignation from me from the S.P. at Los Angeles, and they know it.

* * *

Yours respectfully;

/s/ WALTER F. J. SHELLEY,
Sometimes called "Frank Shelley."

SOUTHERN PACIFIC COMPANY

San Pedro, Calif.
May 6, 1938.
File 534.

Subject: Personal Records.

Mr. W. F. Shelley,
Carson City, Nev.

Dear Sir:

Refers to yours of May 2nd asking us to look thru records and notify you the years you were agent of the Southern Pacific, at Fifth Street, San Pedro.

Please be advised that since 1929 all the roads operating into the Harbor were consolidated and placed under the jurisdiction of the Harbor Belt Line Railroad and we are not in possession of personal records of employees at this point prior to that time.

Would suggest that you write to Mr. C. F. Donnatin, Supt. Southern Pacific at the Central Station, Los Angeles, who no doubt could furnish you information requested from his records.

Yours truly,
P. H. MANN,
Agent.

CMB:G

SOUTHERN PACIFIC COMPANY

65 Market Street, San Francisco, California
May 5, 1938

Mr. W. F. Shelley,
Carson City, Nevada.

Dear Mr. Shelley:

Referring to your letter to me of April 27 requesting that I furnish you information concerning your service record with SP Co:

Do not find that there is anything definite in my file concerning your complete service with this Company. As your personal record papers are on file in Superintendent Donnatin's office at Los Angeles, suggest that, if not already done, you call on him for such information.

Yours truly,
/s/ J. S. CUNNINGHAM.

SOUTHERN PACIFIC COMPANY

Los Angeles, California
May 10, 1938

Mr. W. Frank Shelley,
Carson City, Nevada.

Dear Sir:

Your letter of April 27 with reference to service record:

First record in this office is that filed by you on the Salt Lake Division, June 1, 1899, in which you

give reference to previous service with this company from 1893 to 1894 as clerk and stenographer under A. D. Wilder, at Oakland Pier, leaving this position to go to Tucson for employment under J. S. Noble as stenographer and operator. You show employment thereat commencing in 1894 but do not show date of leaving, although you do show that you left Tucson for the purpose of entering college. Record shows following additional service:

January 1, 1899, to October 25, 1907, operator, Salt Lake Division; and clerk, Tucson Division; resigned.

October, 1917, to October, 1919, agent-operator, San Joaquin Division; resigned.

January, 1920, to August, 1927, agent-operator, Salt Lake Division; transferred to Los Angeles Division.

August, 1927, to December, 1930, agent-operator and station clerk, Los Angeles Division.

Yours truly,
/s/ C. F. DONNATIN.

This letter shows 21 years 10 months service.

ERR-8-a
Adopted Apr. '38

Railroad Retirement Board
Claims Service

Employment Relation Questionnaire

(To be executed where the Form AA-2 shows that the employee failed to receive compensation in any of four consecutive months including August, 1935, where compensation was received in more than half of the months in the two years preceding the beginning of the absence, where the personnel record as reported in Section 2 of the Form AA-2 shows no break in the service, where the employee, at the end of the absence, returned to the same class of service as that in which he was previously engaged, and where there is a rule or practice established on the carrier by which employees under these circumstances could maintain an employment relation.)

Applicant: Walter F. J. Shelly A-38554

Employer: Southern Pacific Co.
Department and Division: Operating
Last Occupation prior to August 29, 1935: Clerk

1. On August 29, 1935, was applicant recorded as (a) on furlough? No. (b) On leave of absence? No. (c) Absent on account of sickness or disability? No. (d) If negative answers are made to (a), (b) and (c), state date and cause of separation from service. 5-25-31, 6 month furlough rule.

2. (a) Was the applicant's name on a seniority roster on August 29, 1935, in accordance with an applicable rule governing employees of his class?....
(b) Specify roster and date thereof.....

Remarks: Rule 41 Summary 7-1-4.

Oct. 6, 1938.

(Date)

/s/ J. R. DUCK,
Adj.

Form ERR-9

Findings of Fact and Conclusions of Law with Respect to the Existence of an Employment Relation between applicant, Walter J. F. Shelly, A-38554, and Virginia & Truckee Ry. on August 29, 1935.

I have examined with care the statement of facts on Form ERR-8 and have compared those statements with all the other relevant data, if any, in file and find them to be correct according to the weight of the available evidence. Such statement hereby constitutes my findings of fact with respect to the claim of the applicant to an employment relation, within the meaning of the Railroad Retirement Act of 1937, after August 29, 1935.

Based on these findings of fact, I conclude that the applicant had an employment relation within

the meaning of the Railroad Retirement Act of 1937, after August 29, 1935.

[Longhand note]: Subsequent service only.
Oct. 6, 1938.
(Date)

/s/ J. R. DUCK,
Adjudicator.

Oct. 8, 1938.
(Date)

/s/ THOS. A. McFARLAND,
Reviewer.

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258 N. Avenue 49
Los Angeles, Cal. 11/5/38

Mr. M. E. Lynch,
Claims Service RR Ret. Bd.
Washington.

* * *

When I returned to Los Angeles, I was given a position in the Los Angeles Freight station where I was until the heighth of the depression of 1932, and about October that year I was laid off, but I never resigned and the S. P. Company know very well I never did, and they had no resignation until I resigned this year, Jan. 1st, 1938. After I was laid off in Oct. 1932, I made it my business to regularly go around and try to get on, but my Foreman, Mr. B. J. Van Slyck, always advised me there was no work they could give me to do. I was always

ready, and always willing to work. I could find dozens of Railroad men who would gladly testify in my behalf to this effect.

* * *

/s/ WALTER J. F. SHELLEY.

Dec. 9, 1938

Mr. Walter F. J. Shelley
258 North Avenue 49
Los Angeles, California

Dear Sir:

* * *

Our investigation develops that you did not, on August 29, 1935, enjoy an employment relation with the Southern Pacific Company solely because you were, on November 25, 1930, furloughed, and, in accordance with the Clerk's Schedule, Rule No. 4, automatically separated from service on May 25, 1931, at the expiration of six months.

Since it has been definitely established that no employment relation existed with the Southern Pacific Company on August 29, 1935, the portion of Section 3(b)2 of the Railroad Retirement Act of 1937 which reads in part:

> "In all other cases, (referring to applicants who did not have an employment relationship on August 29, 1935), the years of service shall include only the service subsequent to December 31, 1936."

will necessarily apply and, in your case, it will only

be possible to credit you with service performed subsequent to that date.

* * *

P. F. MURPHY.

Nov. 8, 1939

Mr. Walter F. J. Shelley
258 North Avenue, 49
Los Angeles, California

In reply refer to:
R.R.B. No. A-38554

Dear Sir:

Receipt is acknowledged of your letter of October 27, 1939.

You are hereby informed that your claim has been reopened in order that further investigation and development may be made.

You will be promptly informed of the decision of the Retirement Claims on reconsideration, which will be mailed to your address then of record. In the meantime, you are requested to submit any additional material evidence relating to the question at issue.

The decision on reconsideration will consitute the initial decision of the Retirement Claims and, in event you desire to do so, you may appeal such decision within one year from date of notice thereof.

Very truly yours,
/s/ M. E. LYNCH,
Director of Retirement Claims.

Mr. Walter Francis John Shelley
258 North Avenue 49
Los Angeles, California

Dear Sir:

Your letter of November 13, 1939, addressed to Mr. M. E. Lynch in which you state that you have decided to take your case to the Federal Court has been referred to me for reply.

Your case is now before the Claims Service of the Board where it is receiving careful and impartial attention and I have for that reason not gone into the merits of it. The purpose of this letter is not to discuss the issues involved but to point out to you that under the sections of the law quoted in your letter the right of any person aggrieved by any decision or action of the Board to apply to the Federal Court for relief arises only after the Board has made a decision. A decision of the Claims Service is not a decision of the Board; nor is a decision of the Appeals Council a decision of the Board. If an individual is aggrieved by any decision of the Claims Service he may appeal to the Appeals Council of the Board within one year from the date of such decision and if he is also aggrieved by the decision of the Appeals Council he may then appeal directly to the Board within four months from the date of that decision. If the individual is still aggrieved by the decision of the Board then and only then may he apply to the proper Federal District Court. It is thus necessary to exhaust first all the remedies provided for him within the Board

itself before an individual aggrieved may apply to the Federal Court.

I am enclosing for your information a copy of the part of the Regulations governing appeals within the Board.

Very truly yours,
LESTER P. SCHOENE,
General Counsel.

Form ERR-8
Rev. Jan. '39

Railroad Retirement Board
Claims Service

Employment Relation Questionnaire

S. S. Acct. No. .....

(To be executed where the individual was not in compensated service on August 29, 1935.)

Name of Individual: Walter Francis Shelley
A-.....

Address:
Employer: Southern Pacific Company
Department: Operating
Location or Division: Los Angeles Division
Last occupation prior to August 29, 1935: Auto messenger
Last Day Worked prior to August 29, 1935: November 24, 1930

1. On August 29, 1935, was the individual recorded as:

(a) On furlough on account of reduction in force? No.

(b) On leave of absence? No.

(c) Absent on account of sickness or disability? No.

(d) If absent on account of sickness or disability, was leave of absence required? .....

(e) If required and not granted, explain fully...

(f) If negative answers are made to (a), (b) and (c), state date: November 25, 1930; and cause of separation from service with reference to rule or practice in accordance with which the individual's service was terminated: laid off account reduction in force, seniority rights to continue 6 months under agreement with the BofRC.

Note: If answers to questions (a), (b) and (c) are all in the negative, the date in (f) should be prior to August 29, 1935, and the following questions need not be answered.

* * *

Execute Part I, II, or III, Depending Upon the Status of the Individual on August 29, 1935

I. Where the Individual was Recorded as Being on August 29, 1935, on Furlough:

(a) Class or craft from which furloughed: Clerk

(b) Date of last furlough prior to August 29, 1935: November 25, 1930

(c) Was he subject to call for service? For 6 months only, when seniority expired.

(d) Date called: Not called.
Did he report?
(e) If he did not report, give reason why
(f) Was he ready and willing to serve?

State basis for answer, as personal observation of immediate supervisor, medical or other reports, giving dates on which observations or reports were made: Unknown, when depression ended and positions reestablished he had no seniority and was engaged in outside employment.

* * *

Remarks: Mr. Shelley was not on the telegraphers seniority roster at time of his termination of service. In February, 1929, he transferred from the telegrapher-clerk seniority roster to the freight clerks roster and placed on that roster effective July 1, 1929. On July 1, 1930, his name did not appear on the roster of the telegraphers. On July 1, 1931, his name was dropped from the freight clerks roster account no service performed in past six months, this in accordance with clerks agreement.

Therefore, Mr. Shelley's name did not appear on any seniority roster of this company on August 29, 1935.

Dec. 12, 1939.

/s/ J. S. CUNNINGHAM,
Secretary, Board of Pensions.

The Order of Railroad Telegraphers
System Division No. 53

834 Pacific Building San Francisco, Calif.
November 30, 1939.

18-398

Mr. D. J. Russell, Supt.,
Southern Pacific Company,
Los Angeles, Calif.

Dear Sir:

Conversation with Miss Wolfe November 29th:

January 1st 1930 Telegraphers' Seniority list shows:—

171. Shelley, W. F. Agent Extra list Dec. 17, 1921

Mr. Shelley's name does not appear on the Official Telegraphers' Seniority list issued July 1, 1930.

Yours very truly,
/s/ [Indistinguishable]
Local Chairman.

Form B—49a
A-38554

DISALLOWANCE MEMORANDUM

Name of applicant Walter Francis John Shelley.

This claim has been carefully reviewed and it has been determined that the applicant is ineligible to receive credit for prior service.

Other reasons: LWD for Southern Pacific prior to 8-29-35 was 5-25-31 and lost rights at expiration

6 months furlough. Eligible for subsequent service only. Confirmation original decision.

We hereby certify that the facts as stated above are true and correct and in accordance with the rules and regulations promulgated by the Railroad Retirement Board.

/s/ O. E. HARRIS,
Adjudicator.

/s/ G. H. GENTRY,
Reviewer.

I, the undersigned, an officer of the Railroad Retirement Board, duly authorized to make decisions under section 10(b) 5 of the Railroad Retirement Act of 1937 on applications for annuities or death benefits, do hereby constitute in pursuance of such authority the foregoing statements as my decision of fact and law.

/s/ THOS. A. McFARLAND,
Supervisor.

Approved Dec. 28, 1939.

Jan. 2, 1940.

Mr. Walter Francis John Shelley
258 North Avenue 49
Los Angeles, California

In reply refer to
R.R.B. No. A-38554

Dear Sir:

Further reference is made to your Application No. A-38554 for an annuity.

To be eligible to receive an annuity under the Railroad Retirement Act of 1937 based in whole or in part on service rendered prior to January 1, 1937, an individual must qualify by having been in the compensated service of an employer as defined in the Act or by having been in an employment relation to such an employer on August 29, 1935.

An employment relation can exist only if there was at the time in question in effect on the employer an established rule or practice in accordance with which the individual was either on furlough, subject to call for service and ready and willing to serve, or on leave of absence or absent on account of sickness or disability, all in accordance with the established rules and practices in effect on the employer.

Inasmuch as the carrier record shows you did not enjoy an employment relation on August 29, 1935, any annuity which you may be entitled to receive is based on service subsequent to January 1, 1937.

It is regretted we had no alternative other than to declare that you are not entitled to receive an annuity based on service performed prior to January 1, 1937.

If, after reading this letter, you are dissatisfied with the decision of the Claims Service, you are privileged to appeal therefrom within one year from the date of this letter by requesting appeal forms and following the procedure as outlined on the reverse side of this letter.

Very truly yours,

/s/ O. E. HARRIS.

H. SORENSEN,
Director of Retirement
Claims.

APPEAL FROM INITIAL DECISION OF THE CLAIMS SERVICE OR DIVISION OF RETIREMENT CLAIMS

The Claims Service of the Retirement Board has proceeded upon a wrong theory, to-wit that I "left" the service of the Southern Pacific RR in 1933, when "laid off" due to the depression. The facts are, that I did not so leave its employment, but was informed at the time, by the Foreman over me, Mr. B. J. Van Slyck that, owing to the depression, a reduction of the force had been ordered, and that I, with others, must be "laid off temporarily", and I need not worry, the lay-off was only temporary,

and until such time as business improved, when I would be given back my old place. I was told by Mr. Van Slyck, my Foreman, to come around frequently, and report for work, which instructions I complied with, coming to the Office time after time, month after month, up until 1937, at which time I made a formal complaint to my Superintendent, Mr. C. F. Donnatin, who expressed his sympathy, and stated he would write the Vice-President and try to get me placed back in my old position, or some other place in the Office. That shortly thereafter, Mr. Donnatin wrote me, copy attached, that he had been unable to obtain the premission asked, and that nothing therefore could be done.

The fact of my reporting in person, month after month, became common knowledge among fellow employees, and can be readily established.

Section 288 A Sec. B of the 1937 Act states:

"An Individual Is in the Employment Relation to An Employer, If He Is on Furlough, Subject to Call, Within or Outside of the United States, and Ready and Willing to Serve."

/s/ WALTER F. J. SHELLEY.

* * *

I determined to get employment, and when the S.P. Railroad would not put me back to work, I went to Nevada, and the Virginia and Truckee were glad to secure my services. This was a "re-employment," it is true, but it was upon efficiency and merit, and I am entitled to my Pension.

/s/ WALTER FRANCIS JOHN SHELLEY,

Known as "Frank Shelley".

DECISION OF THE APPEALS COUNCIL

Decision No. 1623
Appeal No. 1992
R.R.B. No. A-38554

Mr. Walter Francis John Shelley
258 North Avenue 49
Los Angeles, California.

September 29, 1941.

The applicant filed an application for an annuity on January 11, 1937, and claimed an employment relation with the Southern Pacific Company. Under date of September 30, 1939, he was advised by the Division of Retirement Claims that he had been awarded an annuity based on service performed subsequent to December 31, 1936. He was advised by the Division of Retirement Claims under date of January 2, 1940, that he was not eligible to receive an annuity based on service rendered prior to January 1, 1937, because he was not an "em-

ployee" on August 29, 1935, the enactment date of the Railroad Retirement Acts, as claimed. On December 2, 1940, he filed an appeal from that decision.

Facts:

In his application, the applicant claimed to have been born May 24, 1870. He later advised that his correct date of birth was May 24, 1873, which birth date has been verified. In his application, he stated that he last worked for the Southern Pacific Company in 1932 as stenographer-typist.

The secretary of the Board of Pensions of the Southern Pacific Company reported to the Board on R.R.B. Form ERR-7 dated November 22, 1937, that the applicant last worked as a clerk, and that on August 29, 1935, he was not on furlough, not on leave of absence, nor absent on account of sickness or disability. The secretary of the Board of Pensions further advised that the applicant lost his rights to return to service after the expiration of six months from the date on which he was laid off and that his last compensated service was performed November 25, 1930.

On June 22, 1938, the applicant filed another application in which he stated that he last worked for the Virginia and Truckee Railway Company on June 2, 1938.

Under date of July 25, 1938, the applicant was informed by the Claims Service (now the Division of Retirement Claims) that he was not eligible to receive an annuity under the Railroad Retirement

Acts, based on service performed by him prior to January 1, 1937, because he did not have an employment relation, within the meaning of the Railroad Retirement Acts and the Board's regulations, with the Southern Pacific Company on August 29, 1935.

The applicant protested this decision, contending that he was a telegrapher at Ventura, California, and agent at Los Angeles, California, in 1930 for the Southern Pacific Company. The applicant was advised by the Division of Retirement Claims on November 8, 1939, that his claim had been reopened in order that a further investigation might be made.

In response to a request for additional information, the secretary of the Board of Pensions of the Southern Pacfiic Company reported to the Board on R.R.B. Form ERR-8 signed December 12, 1939, that the applicant last worked as auto messenger on November 24, 1930, at which time he was laid off on account of reduction in force and in accordance with the agreement with the Brotherhood of Railway Clerks he retained his seniority rights for six months thereafter, and that when the depression ended and the positions were established, the applicant had no seniority and was engaged in outside employment. The secretary of the Board of Pensions further advised that:

> "Mr. Shelley was not on the telegraphers seniority roster at time of his termination of services. In February, 1929, he transferred from the telegrapher-clerk seniority roster to

the freight clerks roster and placed on that roster effective July 1, 1929. On July 1, 1930, his name did not appear on the roster of the telegraphers. On July 1, 1931, his name was dropped from the freight clerks roster account no service performed in past six months, this accordance with clerks agreement.

"Therefore Mr. Shelley's name did not appear on any seniority roster of this company on August 29, 1935."

It has been determined by the Railroad Retirement Board that there was an agreement in effect February 1, 1922, revised January 1, 1924, and still in effect on August 29, 1935, on the Southern Pacific Company covering the applicant's class of employment (clerks), under the terms of which individuals who had been out of service because of a reduction in force for a period of six months were dropped from the roster and lost their seniority rights.

It has been determined by the Board that after he last worked for the Southern Pacific Company in 1930, the applicant rendered service for compensation in April, May, and June, 1938, to the Virginia and Truckee Railway Company which is a carrier subject to the Railroad Retirement Acts.

Under date of September 30, 1939, the applicant was informed by the Division of Retirement Claims that he had been awarded an annuity under the Railroad Retirement Act of 1937, based on service rendered by him to the Virginia and Truckee Railway Company in the months of April and May,

1938. The applicant's monthly annuity amounted to 17 cents and in accordance with Section 3 (i) of the Railroad Retirement Act of 1937, he was awarded the commuted value of his annuity, $20.47.

The applicant contends that he never resigned from the service of the Southern Pacific Company and that he is entitled to larger annuity inasmuch as he has completed 44 years of service with carriers covered by the Acts.

Discussion:

The Southern Pacific Company has reported that prior to August 29, 1935, the applicant last worked for that company in November, 1930. Subsequent to November, 1930, the applicant was employed by the Virginia and Truckee Railway Company in the months of April, May and June, 1938.

In Section 204.02 (a) of the Board's regulations with respect to employment relation, is is provided that:

> "An employment relation exists if there was, at the time in question, in effect on the employer an established rule or practice in accordance with which the individual was either (1) on furlough (subject to call for service and ready and willing to serve) or (2) on leave of absence, or (3) absent on account of sickness or disability."

In Section 204.02 (b), it is provided that:

> "A furlough, leave of absence, or absence on account of sickness or disability, within the

scope of these regulations or the Railroad Retirement Act of 1937, does not exist unless the terms of the established rule or practice in accordance with which the individual is out of active service are such that they would operate to restore him to active service upon the occurrence of definite and ascertainable events or conditions. * * *."

(This section of the regulations is also applicable to the Railroad Retirement Act of 1935.)

Section 204.03 (b) provides that:

"Where the terms of a furlough, or the rules or practices under which it was issued, place a limitation on the time within which the furlough will operate to return an individual to active service, the employment relation ceases upon the expiration of such period, unless he has resumed active service within the period. * * *."

The Southern Pacific Company has reported that the applicant transferred from the telegrapher-clerk roster to the freight clerk roster in February, 1929, that his name was placed on the freight clerks' roster effective July 1, 1929, and that on July 1, 1930, his name did not appear on the telegrapher-clerk's roster. Therefore, it is obvious that after the applicant transferred to the freight clerks' roster in February, 1929, the company considered that he no longer maintained rights as a telegrapher.

The Southern Pacific Company has reported that the applicant last worked in November, 1930, as auto messenger, at which time he was laid off on account of reduction in force. Under the terms of the agreement in effect at the time the applicant last worked for the railway company, employees of the applicant's class, who had been out of service because of reduction in force for a period of six months, were dropped from the roster and lost their seniority rights. The railway company has reported to the Board that the applicant did not reenter service within six months and under the terms of the agreement he lost his seniority rights. The applicant contends that he never resigned from the service of the railway company. However, the railway company has reported that the applicant last worked in November, 1930, that his rights were automatically terminated in July, 1931, when his name was dropped from the freight clerks' roster in accordance with the clerks' agreement which was in effect at the time he ceased active service, and that thereafter he was no longer considered to be an employee of the company. In accordance with Section 204.03 (b) of the Board's regulations, the applicant's employment relation terminated at the expiration of the six months after he was laid off. He was not thereafter considered to be an employee of the railroad company and there was not thereafter any established rule or practice in effect on the railroad company which would have operated to restore the applicant to active service upon the occurrence of

any definite and ascertainable events or conditions. Therefore, the applicant did not have an employment relation, within the meaning of the Railroad Retirement Acts and the Board's regulations, with the Southern Pacific Company on or after August 29, 1935.

Section 202 of the Railroad Retirement Act of 1937 provides:

> "The claims of individuals (and the claims of spouses and next of kin of such individuals) who, prior to the date of the enactment of this Act, relinquished all rights to return to the service of a carrier as defined in the Railroad Retirement Act of 1935 or ceased to be employee representatives as defined therein, and became eligible for annuities under such Act, shall be adjudicated by the Board in the same manner and with the same effect as if this Act had not been enacted. * * *."

The 1937 Act became a law on June 24, 1937, and became applicable to all cases other than those specified by Section 202. On and after August 29, 1935, and prior to June 24, 1937, the applicant did not qualify as an employee, and, consequently, prior to June 24, 1937, he was not eligible to receive an annuity under the Railroad Retirement Act of 1935. This claim must, therefore, be adjudicated in accordance with the provisions of the Railroad Retirement Act of 1937.

In Section 3 (b) of the 1937 Act, the method to

be usd in determining the years of service on which an annuity shall be based is defined in subsection (1), as follows:

> "In the case of an individual who was an employee on the enactment date, the years of service shall include all his service subsequent to December 31, 1936, and if the total number of such years is less than thirty, then the years of service shall also include his service prior to January 1, 1937, but not so as to make his total years of service exceed thirty: * * *."

Subsection (2) of Section 3 (b) provides that:

> "In all other cases, the years of service shall include only the service subsequent to December 31, 1936."

Subsection (4) of Section 3 (b) provides that:

> "In no case shall the years of service include any service rendered after June 30, 1937, by an individual who is sixty-five years of age or over, except for the purpose of computing his monthly compensation as provided in subsection (o) of this section."

The provisions of the Railroad Retirement Act of 1937 thus require that to be eligible for an annuity based on service performed for a carrier prior to January 1, 1937, the person must have been an employee on August 29, 1935, the enactment date of the 1937 Act, by having been in the active service of or in an employment relation to an employer on that date. The applicant did not qualify as an em-

ployee on August 29, 1935; therefore, under the provisions of subsection (2) of Section 3 (b) of the 1937 Act, the "years of service" used in calculating any annuity to which the applicant may be entitled may not include any service performed by him prior to January 1, 1937. Since the applicant attained age 65 in May, 1938, any service performed by him subsequent thereto may not be included except for the purpose of determining his monthly compensation. The annuity which has been awarded the applicant was properly based only on service performed by him subsequent to December 31, 1936, and prior to the month following the month in which he attained age 65.

Conclusion:

The decision of the Division of Retirement Claims is sustained.

/s/ JASPER A. MILLER.

/s/ CHESTER C. THORPE.

/s/ MARTIN L. BUSHBLOW.

/s/ HOWARD J. SHEA.

/s/ FRANK H. WILLY.

Southern Pacific Company
(Pacific System)

Agreement Between
Southern Pacific Company
(Pacific System)
and
All that Class of Clerks and Other Office, Station and Store Employees Represented by
the
Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees.

Effective February 1, 1922

(Revised to January 1, 1924)

Rule 41.

An employee whose position is abolished, or who is displaced under conditions not otherwise provided for in these rules, may within five (5) days (or if on leave of absence, within five (5) days from date of return) displace a junior employee.

When an employee is assigned to a temporary position he may, at the conclusion of such assignment, either return to his former status, or displace a junior employee who has bid in a position during his occupancy of such temporary position.

An employee laid off on account of reduction in force, or through displacement, shall have his name carried on the seniority roster without the status of an employee for six (6) months, and shall, if

available within a reasonable time, be given preference in the order of seniority over other applicants when force is increased, provided employing officer is currently advised of address.

Memorandum of Understanding

1. It is agreed between the Southern Pacific Company (Pacific Lines) and all that class of clerks and other office, station and store employees represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees that:

2. Employees coming within the scope of Clerks' Agreement who have been laid off subsequent to June 30, 1930, and prior to June 30, 1931, as a result of reduction in force, and who have complied with Rule 41 of the current Clerks' Agreement, and through the operation of the last paragraph of Rule 41 of said Agreement have lost or will lose their seniority prior to June 30, 1931, shall have their seniority carried on the seniority roster, without the status of an employee, until June 30, 1931.

3. It is understood that this extension to the provisions of Rule 41 is agreed to due to the unusual economic situation which has prevailed during the past few months, and that the arrange-

ment is not to be considered as establishing a precedent.

For the Southern Pacific Co.
(Pacific Lines.)

/s/ R. E. BEACH,
Supervisor of Wage
Schedules.

For the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees

/s/ E. A. McMILLAN,
General Chairman.

/s/ F. W. TENNEY,
General Secretary-Treasurer.

San Francisco, Calif.,
January 21, 1931.

Before the Railroad Retirement Board
Hon. Murray W. Latimer, Chairman.

Dear Mr. Latimer:

* * *

During the great depression of 1932 and 1933 when the Company reduced its Staffs, a great number of reductions were made in every department, and myself with others were laid off, but I was really eligible for Pension under the 1934 Act, having worked for 30 years but, being in good health, I was eager to continue working, and therefore applied constantly, asking to be reinstated.

As I had been in Official positions, I was hoping another such position, which I was competent to fill would be available, because I had taken great interest in the Company's affairs, and had enjoyed the work, and my health, even today is excellent, although I am 69 years of age.

Mr. T. H. Williams wrote me in 1932 that he would try and help me by appointing me to a position not covered by any Union Agreements, and he recommended that I keep on trying, and not attempt to have my Seniority as a Telegrapher changed from the O.R.T. Roster, and had he lived, I know I would have received such an appointment. My last work in Southern California was at Firestone Park, and I was let out at the time of the great Long Beach Earthquake in 1933, and later on I secured another place with the Virginia & Truckee Ry. at Carson City, Nevada, in 1938, which was my last Railroad work.

Los Angeles, Calif., Sept. 29th, 1942.

/s/ WALTER F. J. SHELLEY.

Railroad Retirement Board

Appeal of
Walter Francis John Shelley
R.R.B. No. A-38554

CLAIMS APPEAL DOCKET No. 206

At a regular meeting of the Railroad Retirement Board held on October 12, 1943, the Board

adopted the following statement, findings of fact, and decision in the claim of Walter Francis John Shelley, hereinafter called "appellant":

Statement

This case is before the Board on appeal from Decision No. 1623, Appeal No. 1992, of the Appeals Council dated September 29, 1941, and holding that the appellant did not on August 29, 1935, qualify as an "employee" within the meaning of the Railroad Retirement Act of 1937, 50 Stat. 307, and was not therefore entitled to an annuity based on service rendered to an "employer" prior to January 1, 1937.

As the appellant has been awarded a lump sum annuity under the Railroad Retirement Act of 1937 based on compensated service rendered after December 31, 1936, to an "employer" as defined in the 1937 Act, the issues presented on this appeal are whether he is entitled to any annuity under the Railroad Retirement Act of 1935, 49 Stat. 967, and, if not, whether he is entitled to receive credit toward an annuity under the 1937 Act for service rendered prior to January 1, 1937.

The Railroad Retirement Act of 1935 provides annuities for individuals otherwise qualified who were "employees" of "carriers" within the meaning of the Act on or after August 29, 1935. The Railroad Retirement Act of 1937 provides that an annuity may be awarded for service performed prior to January 1, 1937, only to those individuals

who were "employees" on August 29, 1935. The term "employee" as used in the 1935 Act includes individuals "in the service of" and in an "employment relation" to a "carrier" as the latter term is defined in the Railroad Retirement Act of 1935, and "representatives." As used in the 1937 Act, the term "employee" includes individuals "in the service of" or in an "employment relation" to an "employer" as the latter term is defined in the Railroad Retirement Act of 1937, and "employee representatives." The provisions of the 1937 Act superseded those of the 1935 Act with respect to all "employees" who had not relinquished their rights to return to service and become eligible for an annuity under the provisions of the 1935 Act prior to June 24, 1937, the date the 1937 Act became a law.[1] Accordingly, any individual who did not have an "employee" status on August 29, 1935, or at any time between that date and June 24, 1937, cannot be eligible for an annuity under the

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[1]Section 202 of the Act of June 24, 1937, provides in part that:

> "The claims of individuals, (and the claims of spouses and next of kin of such individuals) who, prior to the date of the enactment of this Act, relinquished all rights to return to the service of a carrier as defined in the Railroad Retirement Act of 1935 or ceased to be employee representatives as defined therein, and became eligible for annuities under such Act, shall be adjudicated by the Board in the same manner and with the same effect as if this Act had not been enacted: * * *."

1935 Act and his claim must be adjudicated under the 1937 Act.

There is neither a claim nor evidence that the appellant was on August 29, 1935, or at any time between that date and June 24, 1937, in the active service of a "carrier" as defined in the Railroad Retirement Act of 1935 or that he was ever a "representative" as defined in that Act. Likewise there is neither a claim nor any evidence that the appellant was on August 29, 1935, in the active service of an "employer" as that term is defined in the Railroad Retirement Act of 1937 or that he was ever an "employee representative" as defined in that Act. Thus the questions to be decided are whether appellant was an "employee" by reason of being in an "employment relation" to a "carrier" between August 28, 1935, and June 24, 1937, within the meaning of the Railroad Retirement Act of 1935, and whether he was an "employee" by reason of being in an "employment relation" to an "employer" on August 29, 1935, within the meaning of the Railroad Retirement Act of 1937.

Section 1(d) of the Railroad Retirement Act of 1935 provides that:

> "A person is in the employment relation to a carrier when furloughed or on leave of absence, and subject to call for service and ready and willing to serve, all in accordance with the established rules and practices usually in effect on railroads."

Section 1(d) of the 1937 Act provides that:

> "An individual is in the employment relation to an employer if he is on furlough, subject to call for service within or outside the United States and ready and willing to serve, or on leave of absence, or absent on account of sickness or disability; all in accordance with the established rules and practices in effect on the employer: * * *."

In his application for an annuity filed with the Board on January 11, 1937, the appellant claimed to have been born on May 24, 1873 (which birth date has been verified) and to have performed service last in 1932 as a stenographer and typist in the freight house of the Southern Pacific Company,[2] hereinafter called the Southern Pacific. Prior to filing his application, in a letter dated November 14, 1936, the appellant stated that he had been employed by the Southern Pacific as agent and telegrapher and as a stenographer and that in 1931 the company laid him off with a promise that when business improved he would be reemployed and allowed all his seniority rights. Under date of December 8, 1936, he informed us in a letter that he had been laid off because he could not work as fast as younger men and he submitted at copy of a letter dated June 26, 1931, addressed

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[2]The Southern Pacific Company is a "carrier" under the Railroad Retirement Act of 1935 and is an "employer" under the Railroad Retirement Act of 1937; accordingly, service of "employees" with that company is creditable toward annuities under the acts.

to him by the president of the Southern Pacific, to the effect that in November, 1930, the appellant had been given a "voluntary leave of absence by reason of physical disability" but that subsequent to November, 1930, "a man with greater seniority than yours has exercised his choice on the position formerly assigned to you, which has resulted in placing you on our laid-off list."

The Southern Pacific reported to the Board on December 12, 1939, that the appellant last worked for that company in November, 1930, as an auto messenger; that as of August 29, 1935, he was not recorded as on furlough, on leave of absence or absent on account of sickness or disability; and that the cause of his separation from service was "laid off account of reduction in force, seniority rights to continue 6 months under agreement with the B of R C." It was further reported:

> "Mr. Shelley was not on the telegraphers seniority roster at time of his termination of service. In February, 1929, he transferred from the telegrapher-clerk seniority roster to the freight clerks roster and placed on that roster effective July 1, 1929. On July 1, 1930, his name did not appear on the roster of the telegraphers. On July 1, 1931, his name was dropped from the freight clerks roster account no service performed in past six months, this accordance with clerks agreement.
>
> "Therefore Mr. Shelley's name did not ap-

pear on any seniority roster of this company on August 29, 1935."

In connection with the appellant's employee status as an agent-telegrapher, to the local chairman of The Order of Railroad Telegraphers, System Division No. 53, in a letter dated November 30, 1939, stated that the appellant's name appeared on the January 1, 1930, roster covering employees of that classification but that it did not appear on the seniority roster issued July 1, 1930. In view of the above information it would appear that any rights which the appellant had to return to the service of the Southern Pacific Company after November, 1930, were governed by the terms of the schedule working agreement between the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees and the Southern Pacific which was in effect on the Southern Pacific during and after November, 1930. Although the appellant has claimed to have performed service for the Southern Pacific on various dates from 1931 to 1933 he nevertheless has continued to maintain that his separation from active service was due to a lay-off on account of a reduction in forces. It is not important whether he last worked in 1930, 1931, 1932, or 1933; it is his status between August 28, 1935, and June 24, 1937, which is important.

An agreement between the Southern Pacific and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees,

effective February 1, 1922, and revised January 1, 1924, was in effect in November, 1930, and through August 29, 1935. Article VIII, Rule 41, of that agreement with respect to the abolition of positions, displacements, and reduction of force reads as follows:

> "An employee whose position is abolished, or who is displaced under conditions not otherwise provided for in these rules, may within five (5) days (or if on leave of absence, within five (5) days from date of return) displace a junior employee.
>
> "When an employee is assigned to a temporary position he may, at the conclusion of such assignment, either return to his former status, or displace a junior employee who has bid in a position during his occupancy of such temporary position.
>
> "Employees thus displaced may displace other employees in the same manner.
>
> "An employee laid off on account of reduction in force, or through displacement, shall have his name carried on the seniority roster without the status of an employee for six (6) months, and shall, if available within a reasonable time, be given preference in the order of seniority over other applicants when force is increased, provided employing officer is currently advised of address."

The text of a "Memorandum of Understanding" dated at San Francisco, California, on January 21,

1931, and signed by Mr. R. E. Beach, Supervisor of Wage Schedules for the Southern Pacific, and Mr. E. A. McMillan, General Chairman, and M. F. W. Tenny, General Secretary-Treasurer, for the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, is as follows:

"1. It is agreed between the Southern Pacific Company (Pacific Lines) and all that class of clerks and other office, station and store employees represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees that:

"2. Employees coming within the scope of Clerks' Agreement who have been laid off subsequent to June 30, 1930, and prior to June 30, 1931, as a result of reduction in force, and who have complied with Rule 41 of the current Clerks' Agreement, and through the operation of the last paragraph of Rule 41 of said Agreement have lost or will lose their seniority prior to June 30, 1941, shall have their seniority carried on the seniority roster, without the status of an employee, until June 30, 1931.

"3. It is understood that this extension to the provisions of Rule 41 is agreed to due to the unusual economic situation which has prevailed during the past few months, and that the arrangement is not to be considered as establishing a precedent."

Thus, in accordance with the terms of the above-quoted "Memorandum of Understanding" which governed the appellant's class of employees, his name was carried on the seniority roster covering that class until June 30, 1931, and he maintained rights to return to the active service of the Southern Pacific until that date.

The Regulations which we have promulgated under the Railroad Retirement Acts ("Regulations Under the Railroad Retirement Act of 1937," 4 Fed. Reg., 1477, April 7, 1939) set forth our interpretation of the employment relation provisions of both Acts. Section 204.2(a) of the Regulations provides that:

> "An employment relation exists if there was, at the time in question, in effect on the employer an established rule or practice in accordance with which the individual was either (1) on furlough (subject to call for service and ready and willing to serve) or (2) on leave of absence, or (3) absent on account of sickness or disability."

The Regulations relating to the existence or non-existence of an "employment relation" under the 1937 Act apply with equal force and effect to cases under the 1935 Act except that:

> "(a) Individuals absent on account of sickness or disability, as that term is used in such regulations, do not have an employment relation under the 1935 Act, and

"(b) Individuals on leave of absence, as well as individuals on furlough, are required to be subject to call for service and ready and willing to serve in order to have an employment relation under the 1935 Act." (Sec. 204.05.)

Furlough is defined by Section 204.02(b) of the Regulations as—

"an involuntary absence from active service which is brought about by action of the employer"

with the limitation that—

"An individual on furlough can have an employment relation only if at the time in question he was subject to call for service and ready and willing to serve."

Leave of absence is defined in Section 204.02(b) of the Regulations as—

"action of the employer permitting or requiring the employee to remain away from active service and relieving the employee from the obligations or conditions attached to active service, or to a furlough relationship or to absence on account of sickness or disability; * * *."

Absence on account of sickness or disability is defined in Section 204.02(b) of the Regulations as—

"an interruption of active service, or of a furlough, by reason of sickness or disability."

Section 204.02(b) of the Regulations provides also that a furlough, or a leave of absence, or an absence on account of sickness or disability, does not exist within the scope of the Regulations and of the Railroad Retirement Acts

> "unless the terms of the established rule or practice in accordance with which the individual is out of active service are such that they would operate to restore him to active service upon the occurrence of definite and ascertainable events or conditions."

Finally, Section 204.02(f) of the Regulations provides that—

> "The termination of an employment relation need not involve a specific action but may be inferred from circumstances. It is terminated in any case in which there has been a discharge, resignation, or retirement, with or without pension. Discharge, resignation or retirement must be determined according to the substance of the transaction, even though the transaction may have been denominated furlough, leave of absence or absence on account of sickness or disability. A transaction so denominated, but which represents in substance and effect a discharge, resignation or retirement, terminates the employment relation."

Since the appellant's rights to return to service after he ceased active service in November, 1930, were governed by the schedule working agreement

then in effect between the Southern Pacific and the railway labor organization representing his class of employees as well as the "Memorandum of Understanding" dated January 21, 1931, referred to above, it is clear that he no longer had any rights to return to the service of the Southern Pacific after July 1, 1931, and that after July 1, 1931, there was no established rule or practice in effect on the Southern Pacific in accordance with which he could have been restored to active service upon the occurrence of any definite and ascertainable event or condition. Furthermore, the action of the Southern Pacific in removing his name from the seniority roster covering his class of employees on July 1, 1931, definitely terminated any employment relationship which the appellant may have had prior to that date. (Regulations, Section 204.02(f).)

The appellant claims that after he had been laid off on account of a reduction in force he was promised that he would be reemployed and would be allowed all his seniority rights. In connection with this claim, he has submitted a photostatic copy of a letter dated October 6, 1931, addressed to him by the president of the Southern Pacific which indicates that a promise of future employment may have been made to the appellant by officials of that company. However, a promise of employment in the future would not operate to maintain an employment relation for the appellant after July 1, 1931, since it is quite clear that his employment relation within the meaning of

the Railroad Retirement Acts and the Regulations ceased at least by July 1, 1931, when his name was removed from the seniority roster governing his class of employees. Section 204.03(e) of the Regulations provides as follows on this point:

> "When such rights to return to service as an individual may hold, in accordance with the established rules and practices in effect on the employer, are terminated, but in connection with such termination or coincidentally therewith, a promise not in accordance with the established rules or practices in effect on the employer is made, indicating some future employment, such promise does not operate to maintain an employment relation."

The appellant urges that he continued to enjoy an employment relation with the Southern Pacific because he did not resign from the service of that company until some time in 1938. From a review of Section 204.02(f) of the Regulations quoted above it can be seen that resignation is not the only manner in which an employment relation under the Acts may be terminated. Thus, even though the appellant may not have tendered a formal resignation to the Southern Pacific on or before July 1, 1931, his employment connection with the company was severed when the company as of July 1, 1931, removed his name from the roster covering his class of employees.

From the foregoing it is quite clear that the appellant was not at any time between August 28,

1935, and June 24, 1937, in an "employment relation" to a "carrier" as defined in the Railroad Retirement Act of 1935; accordingly he was not an "employee" during that period within the meaning of that Act and he could not have been eligible for any annuity under the Railroad Retirement Act of 1935. It is also clear that he was not on August 29, 1935, in an "employment relation" to an "employer" as defined in the Railroad Retirement Act of 1937; accordingly he was not on that date an "employee" within the meaning of that Act.

The appellant entered the service of the Virginia and Truckee Railway[3] in April, 1938, and performed compensated service for that company until June 2, 1938, at which time he resigned and relinquished all rights to return to service. As he became an "employee" of an "employer" after August 29, 1935, by entering the active service of the Virginia and Truckee Railway and attained age sixty-five in May, 1938, appellant became eligible to receive an annuity under the 1937 Act.[4] Ac-

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[3]The Virginia and Trukee Railway is a "carrier" under the Railroad Retirement Act of 1935 and is an "employer" under the Railroad Retirement Act of 1937; accordingly, service of "employees" with that company is creditable toward annuities under the Acts.

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[4]The Railroad Retirement Act of 1937 provides annuities for individuals otherwise qualified who on or after the enactment date (August 29, 1935) were "employees" and who on or after that date were sixty-five years of age or over.

cordingly, it will be seen that we do not take the position that the appellant was not eligible for an annuity under the 1937 Act because he was not in the service of a "carrier" or of an "employer" on August 29, 1935. It is clear that he is eligible to receive an annuity under the Railroad Retirement Act of 1937, but we must look to other sections of that Act to determine the amount of an annuity to be awarded to him.

Section 3(a) of the 1937 Act, which explains the method in which an annuity may be computed, provides as follows:

> "The annuity shall be computed by multiplying an individual's 'years of service' by the following percentages of his 'monthly compensation': 2 per centum of the first $50; 1½ per centum of the next $100; and 1 per centum of the next $150."

and Section 3(b) states in part that the "years of service" of an individual shall be determined as follows:

> "(1) In the case of an individual who was an employee on the enactment date, the years of service shall include all his service subsequent to December 31, 1936, and if the total number of such years is less than thirty, then the years of service shall also include his service prior to January 1, 1937, but not so as to make his total years of service exceed thirty: * * *." (Underscoring ours.)

"(2) In all other cases, the years of service shall include only the service subsequent to December 31, 1936."

According to Section 3(b)(1) of the 1937 Act, if the appellant is to receive credit toward an annuity under the 1937 Act for service which he performed for an "employer" prior to January 1, 1937, he must have been an "employee" on the enactment date (August 29, 1935) and this status he did not have as hereinbefore set forth. Furthermore, in accordance with Section 3(b)(2) of the 1937 Act quoted above, unless he was an "employee" on that date, we are expressly prohibited from including in his "years of service" any service other than that which he rendered to an "employer" after December 31, 1936.

The appellant claims that he should receive credit for all service rendered by him whether rendered before or after January 1, 1937, and bases his claim on the decision rendered on May 6, 1935, by the United States Supreme Court in the case of Railroad Retirement Board et al. v. Alton Railroad Co. et al., 295 U. S. 330. He relies on that part of the opinion which reads as follows (page 349):

"In addition to the 146,000 who left the service during the year preceding the passage of the Act, over 1,000,000 persons have been but are not now in the employ of the carriers. The statute provides that if any of them is reemployed at any time, for any period, how-

ever brief, and in any capacity, his prior service with any carrier shall be reckoned in computing the annuity payable upon his attaining 65 years of age."

It should be borne in mind that the opinion of the United States Supreme Court in that case was rendered with respect to the Railroad Retirement Act of 1934, a full two years before the Railroad Retirement Act of 1937 became a law and could not possibly have had reference to the 1937 Act nor could it have been an interpretation of the provisions of the 1937 Act. Nor could that decision have had reference to the Railroad Retirement Act of 1935 as that Act was not approved until August 29, 1935. As the appellant knows, the Railroad Retirement Act of 1934 was held unconstitutional by that decision. The appellant's rights to an annuity must be determined in accordance with the provisions of the Railroad Retirement Acts which were thereafter enacted by Congress.

The appellant further claims that he was promised certain pension rights under a company pension plan in effect on the Southern Pacific and that from 1903 on, certain monthly deductions were made from his salary by that company in accordance with such plan. Whether or not this appellant has any right to a pension under any pension plan in effect on the Southern Pacific is a question which this Board has no jurisdiction to determine under the provisions of the Railroad Retirement Acts.

The appellant was not, on August 29, 1935, an "employee" within the meaning of the Railroad Retirement Act of 1937, and since he was not an "employee" on that date he may not receive credit toward his annuity for any service performed by him prior to January 1, 1937. His annuity must be computed entirely on service performed by him subsequent to December 31, 1936.

On the basis of all the evidence of record we make the following:

Findings of Fact

1. The appellant was born on May 24, 1873.

2. The appellant last rendered service to the Southern Pacific in November, 1930.

3. n accordance with the terms of the schedule working agreement governing his class of employment in effect on the Southern Pacific during the period from November, 1930, through August 29, 1935, his status as an employee was terminated by July 1, 1931.

4. On July 1, 1931, the appellant's name was removed from the seniority roster covering his class of employees.

5. In accordance with the terms of the established rules and practices providing for furloughs for employees of appellant's classification in effect on the Southern Pacific during the period from November, 1930, through August 29, 1935, the ap-

pellant held no rights to return to the service of the Southern Pacific after July 1, 1931.

6. The appellant was not at any time between August 28, 1935, and April, 1938, in the active service of a "carrier" within the meaning of the Railroad Retirement Act of 1935 nor of an "employer" within the meaning of the Railroad Retirement Act of 1937.

7. The appellant was not at any time between August 28, 1935, and June 24, 1937, on furlough, on leave of absence or absent on account of sickness or disability in accordance with any established rules or practices in effect on a "carrier" within the meaning of the Railroad Retirement Act of 1935 or on an "employer" within the meaning of the Railroad Retirement Act of 1937.

8. The appellant entered the active service of the Virginia and Truckee Railway, an "employer" under the Railroad Retirement Act of 1937, in April, 1938, and continued in the service of that company until June 2, 1938.

9. The appellant has been properly awarded an annuity under the Railroad Retirement Act of 1937 on the basis of service which he rendered to the Virginia and Truckee Railway.

Decision

The decision of the Appeals Council that the appellant did not qualify as an "employee" on August 29, 1935, nor at any time between that date

and June 24, 1937, and that accordingly the "years of service" used in calculating any annuity to which he may be entitled may not include any service performed by him prior to January 1, 1937, is affirmed.

The appellant is not entitled to any annuity under the Railroad Retirement Act of 1935 nor is he entitled to credit for service rendered prior to January 1, 1937, toward an annuity under the Railroad Retirement Act of 1937.

/s/ LEE M. EDDY,
Acting Chairman.

/s/ M. R. REED,
Member.

Aug. 8, 1946.

Mr. Walter Francis J. Shelley
258 North Avenue 49
Los Angeles, California

In reply refer to
R.R.B. No. A-38554

Dear Sir:

In a petition for rehearing and for review of the decision on A-38554 dated July 18, 1946, there is a statement that you were employed by the Southern Pacific Company most of the time from 1892 until sometime in the month of October, 1935. You further stated that you were actually employed by the Southern Pacific Company as Telegrapher and

Agent in charge of the station at Firestone Park, California, on August 29, 1935, and went from there to Santa Susana station in the early part of September, 1935, and about three weeks later proceeded to Ventura where you relieved the Southern Pacific Company's Agent and later the Night Telegrapher and Clerk in October, 1935.

No claim for this service has previously appeared in your file, therefore, in order that we may give consideration to this file, therefore, in order that we may give consideration to this claim, will you kindly complete and return the enclosed from G-108. If there is other service during the period from November, 1930, to October, 1935, which has not previously been claimed, please include that on this form also.

In completing this form G-108 care should be exercised in showing the particular name under which you were employed, and if payment was made to someone other than yourself, be sure to advise us concerning such payments.

Very truly yours,

JOHN W. CALLENDER,
Director of Retirement
Claims.

Aug 8, 1946.

Budget Bureau No. 70-R050
Approval Expires March 31, 1949

Form No. G-108
(8-0)

United States of America
Railroad Retirement Board

Request for Supplemental Service Information
Social Security Account Number 710-10-8543.

Claim No. A-38554

To Mr. Walter F. J. Shelley
258 North Avenue 49
Los Angeles, California.

In order to assist in establishing your railroad or other employer service, please fill out all items shown below, using a separate section for each period of service.

Section 1.

(a) Name of Railroad or Other Employer: Southern Pacific Company.
(b) Date Began Service: About May, 1930.
(c) Date Ended Service: June, 1931.
(d) Last Occupation for This Period: Supervising Agent in Charge.
(e) Department: Operating.
(f) Division: Los Angeles.
(g) Location: Niland, California (formerly Imperial Junction).

(h) Foreman or Supervisor: Under Train Master.

(i) Name Exactly As It Appeared on Pay Roll: Walter F. Shelley, or W. Frank Shelley.

Section 2.

(a) Name of Railroad or Other Employer: Southern Pacific Company.

(b) Date Began Service: About June, 1931.

(c) Date Ended Service: Sept., 1932.

(d) Last Occupation for This Period: Stenographer—Freight Bill Clerk.

(e) Department: Freight Station.

(f) Division: Los Angeles.

(g) Location: S. P. Freight Station, Los Angeles, Cal.

(h) Foreman or Supervisor: B. J. Van Slyck, General Foreman.

(i) Name Exactly as It Appeared on Pay Roll: Walter F. Shelley, or W. Frank Shelley.

Section 3.

(a) Name of Railroad or Other Employer: Southern Pacific Company.

(b) Date Began Service: October, 1932.

(c) Date Ended Service: About Jan. 19, 1933.

(d) Last Occupation for This Period: Checking Perishables (Refrigerator and Other Cars).

(e) Department: Freight Dept.

(f) Division: Los Angeles.
(g) Location: 8th & Alameda Sts., Los Angeles. Team Track.
(h) Foreman or Supervisor: Chief Clerk of 8th St. Team Track.
(i) Name Exactly as It Appeared on Pay Roll: Walter F. Shelley or W. Frank Shelley.

Please date and sign with ink or indelible pencil and return in the enclosed self-addressed envelope.

Date August 27th, 1946.

/s/ WALTER FRANCIS J. SHELLEY.

Section 4.

(a) Name of Railroad or Other Employer: Southern Pacific Company.
(b) Date Began Service: Jan. 20, 1933.
(c) Ended Service: About Feb. 20, '33.
(d) Last Occupation for Period: Checking perishables (Refrgrs) and other cars.
(e) Department: L. A. Frt. Station, 6th St. Team Track.
(f) Division: Los Angeles.
(g) Location: 6th and Alameda Sts., Los Angs.
(h) Foreman: Chief Clerk, 6th St. Station.
(l) Name on Pay Roll: Walter F. Shelley or W. Frank Shelley.

Section 5.

(a) Name of Railroad or Other Employer: Southern Pacific Company.
(b) Date Began Service: Febry 21, 1933.
(c) Ended Svc.: About Mar. 15, '33.
(d) Last Occupation for Period: Agent & Telegrapher.
(e) Department: Operating.
(f) Division: Los Angeles.
(g) Location: Firestone Park Station, Cal.

Foreman or Supervisor: Chief Train Dispatcher.

Name exactly as appears on P. Roll: Walter F. Shelley, or W. Frank Sheley.

Section 6.

(a) Name of Railroad or Other Employer: Southern Pacific Co.
(b) Date Began Service: 15 March, 1934.
(c) Ended Svc: 25 March, 1934.
(d) Last Occupation for Period: Night Telegrapher and Clerk.
(e) Department: Operating.
(f) Division: Los Angeles.
(g) Location: Firestone Park Station, Cal.

Foreman or Supervisor: Chief Train Dispatcher.

Name Exactly as Appears on Pay Roll: Walter F. Shelly or W. Frank Shelley.

Section 7.

(a) Name of Railroad or Other Employer: Southern Pacific Company.

(b) Date Began Service: August 20, 1935.

(c) Ended Service: Sept. 9, 1935.

(d) Last Occupation for Period: Agent and Telegrapher.

(e) Department: Operating.

(f) Division: Los Angeles.

(g) Location: Firestone Park Sta., Cal.

Foreman or Supervisor: Chief Train Dispatcher.

(i) Name Exactly as Appears on Pay Roll: Walter F. Shelley, or W. Frank Shelley.

Dated August 27th, 1946.

/s/ WALTER FRANK J. SHELLEY.

Section 8.

(a) Name of Railroad or Other Employer: Southern Pacific Company.

(b) Date Began Service: September 10, 1935.

(c) Date Ended Service: Sept. 25, 1935.

(d) Last Occupation of This Period: Agent and Telegrapher.

(e) Department: Chief Train Dispatcher.

(f) Division: Los Angeles.

(g) Location: Santa Sussana, Cal.

Foreman or Supervisor: Chief Dispatcher.

Name as Exactly Appears on Pay Roll: Walter F. Shelley or W. Frank Shelley.

Relieved Mr. C. R. Sims, Agent, while on vacation.

Section 9.

(a) Name of Railroad or Other Employer: Southern Pacific Company.
(b) Date Began Service: October, 1935.
(c) Date Ended Service: Nov. 21, 1935.
(d) Last Occupation of This Period: Agent in Charge.
(e) Department: Chief Train Dispatcher.
(f) Division: Los Angeles.
(g) Location: Ventura, Cal.
(h) Foreman or Supervisor: Chief Train Dispatcher.
(i) Name as exactly appears on Pay Roll: Walter F. Shelley, or W. Frank Shelley.

Relieved Agent, Mr. Murphy for leave.

Section 10.

(a) Name of Railroad or Other Employer: Southern Pacific Company.
(b) Date Began Service: Nov. 21, 1935.
(c) Date Ended Service: Dec. 1, 1935.
(d) Last Occupation of This Period: Night Telegrapher & Clerk.
(e) Department: Operating.
(f) Division: Los Angeles.
(g) Location: Ventura, Cal.
(h) Foreman or Supervisor: Chief Train Dispatcher.

Name as Exactly Appears on P. Roll: Walter F. Shelley or W. Frank Shelley.

I went to some places to work for the Company in meantime, but can't state where, but was working as Relief or Employee.

/s/ WALTER FRANCIS J. SHELLEY.

Date August 27th, 1946.

Sept. 4, 1946.

Mr. J. S. Cunningham, Secretary
Board of Pensions

Southern Pacific Company
65 Market Street
San Francisco 5, California

In reply refer to
R.R.B. No. A-38554

Dear Sir:

This has reference to the application for an annuity which had been filed by Mr. Walter Francis John Shelley, concerning which we have had considerable previous correspondence.

The information previously furnished indicated that this applicant was last employed by your company in 1931, and that his rights to recall to service were terminated by a furlough limitation.

The applicant has now made additional claims for

service which have not been considered, and we are therefore enclosing Form AA-2P to enable you to recheck his service and to determine whether this service can be verified.

You will note that one period of service covers the interval from August 20, 1935, to September 9, 1935, therefore, will you kindly furnish us with a completed Form ERR-8 if this applicant was employed during this period, but was not in active service on August 29, 1935.

Very truly yours,

JOHN W. CALLENDER,
Director of Retirement
Claims.

Form No. RR-22 (1)
(2-4)

Social Security Account No. 710 - 10 - 8543

United States of America
Railroad Retirement Board

Name of Applicant
Walter Francis John Shelley

Forms and Documents on Carrier Special Annuity Applications
(To be submitted by employer)

Date September 23, 1946
R. R. B. No. A-38554

The forms and documents indicated below, which are required in connection with the above employee's application for annuity, will be forwarded to your office.

You are requested to forward to this office the forms and documents indicated below, which are required in connection with the above employee's application for annuity.

Name of Employer Southern Pacific Company

Signature and title of designated carrier employee
/s/ J. S. CUNNINGHAM,
Secretary Board of Pensions.

Type of Document	Approx. Date of Submission (If attached, specify)	Remarks
Form AA-2P	Attached	
Form ERR-8		See my letter December 12, 1939 transmitting completed form ERR-8 in this case.

To Bureau of Retirement Claims:

The forms and documents indicated above will be submitted by the employer through the field office, *and are not to be requested from the employer or the applicant.*

Social Security Account No. 710 - 10 - 8543
R. R. B. No. A-38554

Record of Employee's Prior Service

Section 1.—Identification

Concerning prior service claimed under the Railroad Retirement Act by—
(Last name) Shelley (First name) Walter (Middle name) Francis John
258 North Avenue 49 Los Angeles California
who states that he served with the employer or its predecessor as shown in section 2 herein.

Section 2.—Employee's Claimed Service
(Employer) Southern Pacific Company

Name on pay roll Shelley Walter F.

	Name of Employer if Not Same as Above	Occupation	Date Began (Month, year)	Date Ended (Month, year)	Department	Location or Division
1	Same	Supervising Agent in Charge	May 1930	June 1931	Operating	Niland, Calif. Los Angeles
2	Same	Stenographer-Ft. Bill Clerk	June 1931	Sept. 1932	Frt. Station	S.P. Frt. Sta. Los Angeles
5	Same	Agent Telegrapher	Feb. 21, 1933	Mar. 15, 1933	Operating	Fireston Park Los Angeles
6	Same	Clerk Nt. Telegrapher	Mar. 15, 1934	Mar. 25, 1934	Operating	Fireston Park Los Angeles
7	Same	Agent Telegrapher	Aug. 20, 1935	Sept. 9, 1935	Operating	Fireston Park Los Angeles

(on page 2)

1	Same	Agt. Telegrapher	Sept. 10, 1935	Sept. 25, 1935	Chief Train Dispatcher	Santa Sussana, California
2	Same	Agt. in Charge	Oct. 1935	Nov. 21, 1935	Chief Train Dispatcher	Ventura, Calif.
3	Same	Nt. Telegrapher Clerk	Nov. 21, 1935	Dec. 1, 1935	Operating	Ventura, Calif.

Section 3.—Birth Data

Employer's records indicate the employee was born at— London England

Age given as 33 years, which has not been verified, and that such date of birth was entered on records of the employer during the year of 1899.

Section 4.—Status August 29, 1935

Was the employee in compensated service on August 29, 1935? No. If the answer is "No" the employer with whom service is claimed on August 29, 1935, will complete and attach form ERR-8.

Section 5.—Personnel Record

Occupation	Department or Division	From— Month	From— Year	To— Month	To— Year
Agent, Freight Clerk and Messenger	Los Angeles Divn	Aug.	1927	Dec.	1930

Section 6.—Service Record

Employer records indicate the employee named herein received compensation in each of the months marked "C" in the following table, that his name did not appear on the pay roll or other detailed compensation records in the months marked "X," and that records for months marked "M" are not available.

	1936	1935	1934	1933	1932	1923	1922	1921	1920	1919	1918	1917	1916	1915	1914	1913	1912	1911	1910	1909
Jan.				x	x															
Feb.				x	x															
Mar.			x	x	x															
April					x															
May					x															
June					x															
July					x															
Aug.		xx			x															
Sept.		xx			x															
Oct.		x			x															
Nov.		x			x															
Dec.		x			x															
Total																				

Special Instructions for August and September 1935.—Check pay roll for second half of August 1935; if name is *not* found on this pay roll, check pay roll for *first* half of August. Check pay roll for *first* half of September 1935; if name is *not* found on this pay roll, check pay roll for *second* half of September. Do not make an entry in more than one block for each of the two months.

Note.—(*a*) Line out spaces for all months for which entries have not been made.
(*b*) Only 30 service years are required for verification.

pay roll periods indicated, that his name did not appear on the pay roll or other detailed compensation record in the periods marked "X," and that records for periods marked "M" are not available.

Name on pay roll Shelley Walter F.

	Compensation								Occupation	
	1931	1930	1929	1928	1927	1926	1925	1924	Year	Title on Pay Roll
Jan.	x	$63.00	$65.20	$80.16					1st	
	x	73.50	68.90	93.52					1931	
Feb.	x	63.00	50.00	86.84					2d	
	x	68.26	5.25	80.16						
Mar.	x	63.00	68.25	86.84					1st	Frt. Bill Typist
	x	71.20	73.50	46.76					1930	Frt. Bill Typist
Apr.	x	68.25	68.25	80.16					2d	Messgr., Distaphone Oper.
	x	68.25	68.25	86.84					1st	Rec. & Del. Clk. Typist
May	x	34.45	63.00	86.84					1929	
	x	5.00	73.51	93.52					2d	Rec. & Del. Clk. Typist
June	x	56.25	68.25	86.84					1st	Agt.-Telegr.
	x	37.29	67.76	86.84					1928	
July	x	60.00	68.15	73.48					2d	Agt.-Telegr.
	x	68.75	68.25	93.52						
Aug.	x	23.75	68.25	86.84	$34.24				1st	
	x	x	73.50	93.52	96.03				1927	
Sept.	x	x	68.26	66.80	68.47				2d	Agt.-Telegr.
	x	45.00	68.25	33.40	80.41				1st	
Oct.	x	64.38	68.25	80.16	75.00				1926	
	x	70.00	68.25	66.80	106.98				2d	
Nov.	x	25.00	68.25	86.84	100.20					
	x	48.40	68.26	80.16	100.20				1st	
Dec.	x	54.60	68.25	86.84	100.20				1925	
	x	5.05	73.50	87.52	93.52				2d	

Note.—(*a*) Line out spaces for all months for which entries have not been made.
(*b*) Enter occupation for the first pay-roll period in each half year on which the employee's name is found.

Section 10.—Certification

All information or data reported on this form in sections 3, 4, 5, 6, 7, and 9, are furnished at the request of the Railroad Retirement Board for official use and are correct to the best of my knowledge and belief. No alterations, interlineations or erasures appear in this report except as noted above under "*Additional information,*" or as initialed by me.

/s/ J. S. CUNNINGHAM,
Secretary Board of Pensions.

Date September 23, 1946.

Note.—The official concerned shall date and sign as to the correctness of all entries.

Section 11.—Excerpts From Railroad Retirement Act of 1937

Section 10 (*b*) (part). "* * * The Board shall have power to require all employers and employees and any officer, board, commission, or other agency of the United States to furnish such information and records as shall be necessary for the administration of such Acts * * *."

Section 13. "Any officer or agent of an employer, as the word 'employer' is hereinbefore defined, or any employee acting in his own behalf, or any individual whether or not of the character hereinbefore defined, who shall willfully fail or refuse to make any report or furnish any information required, in accordance with the provisions of section 10 (*b*) 4, by the Board in the administration of this Act or the Railroad Retirement Act of 1935, or who shall knowingly make or cause to be made any false or fraudulent statement or report when a statement or report is required to be made for the purpose of such Acts, or who shall knowingly make or aid in making any false or fraudulent statement or claim for the purpose of causing an award or payment under such Acts, shall be punished by a fine of not more than $10,000 or by imprisonment not exceeding 1 year."

Budget Bureau No. 70-R050

Approval Expires March 31, 1949

Form No. G-108
(8-0)

United States of America
Raliroad Retirement Board

Request for Supplemental Service Information
Social Security Account Number:
Claim No.: A-38554.

To: Mr. Walter F. J. Shelley
258 No. Ave 49
Los Angeles, Calif.

In order to assist in establishing your railroad or other employer service, please fill out all items shown below, using a separate section for each period of service.

Particular attention should be given to any items checked with red pencil.

Section 1.

(a) Name of Railroad or Other Employer: Southern Pacific Co.
(b) Date Began Service: Fall or Winter, 1936.
(c) Date Ended Service: Fall or Winter, 1936.
(d) Last Occupation for This Period: Engine wiper and sweep roundhouse.
(e) Department: M. E.
(f) Division:

(g) Location: Sparks, Nev.
(h) Foreman or Supervisor:
(i) Name Exactly as It Appeared on Pay Roll: Walter F. or Walter Frank Shelley.

Section 2.

(a) Name of Railroad or Other Employer: Southern Pacific Co.
(b) Date Began Service: Between Jan. & March, 1937.
(c) Date Ended Service: Between Jan. & March, 1937.
(d) Last Occupation for This Period: Stenographic-typist W/Bs & freight bills, etc.
(e) Department: Freight traffic.
(f) Division:
(g) Location: Los Angeles, Cal.
(h) Foreman or Supervisor:
(i) Name Exactly as It Appeared on Pay Roll: Walter F. or Walter Frank Shelley.

Please date and sign with ink or indelible pencil and return in the enclosed self-addressed envelope.

Date 11-7-46.

/s/ W. F. SHELLEY.

Form No. G-563
(10-1)

United States of America
Railroad Retirement Board

Request for Data From Wage Register

Name of Employee: Walter Francis John Shelley.

Soc. Sec. Acct. No.: 710-10-8543.
Date of Birth: May 24, 1873.
Attained Age 65:

Information Is Required for the Items Checked Below

Date of Wage Register: 1945.

Number of Months of Subsequent Service: 3 S. M. thru 1945.
Other, Specify: Service month only 1/1937 thru 12/1945.
Requested By: I. E. Nelson, employment relation.
Dated: 11/18/6.
Data Furnished By: bd.
Date: 11/20/46.

Dec. 2, 1946.

Mr. J. S. Cunningham, Secretary
Board of Pensions

Southern Pacific Company
65 Market Street
San Francisco 5, California

In reply refer to
R.R.B. No. A-38554

Dear Sir:

On September 23, 1946, you completed a Form AA-2P covering service claimed by Mr. Walter Francis John Shelley prior to December, 1935.

Mr. Shelley now states that he worked as an engine wiper, and sweeping the roundhouse from the fall of 1936 to December, 1936, at Sparks, Nevada. Since he has not previously claimed any service during 1936, it is requested that you check your records for this service and complete the attached Form AA-2P.

Your usual prompt cooperation will be appreciated.

Very truly yours,

JOHN W. CALLENDER,
Director of Retirement
Claims.

Social Security Account Number 710 - 10 - 8543
R. R. B. No. A-38554

Record of Employee's Prior Service

Section 1.—Identification

Concerning prior service claimed under the Railroad Retirement Act by

(Last Name) Shelley, (First Name) Walter (Middle Name) Francis

258 North Ave. 49 Los Angeles, Los Angeles County Calif.
who states that he served with the employer or its predecessor as shown in Section 2 herein.

Section 2.—Employee's Claimed Service

(Employer) Southern Pacific Company

Name on pay roll Shelley, Walter Frank

	Name of Employer if Not Same as Above	Occupation	Date Began (month, year)	Date Ended (month, year)	Department	Location or Division
1	Same	Engine Wiper	Fall 1936	Dec. 1936	M. of E.	Sparks, Nevada
2		Sweep Roundhouse				

Section 6.—Service Record

Employer records indicate the employee named herein received compensation in each of the months marked "C" in the following table, that his name did not appear on the pay roll or other detailed compensation records in the months marked "X," and that records for months marked "M" are not available:

	1936	1935	1934	1933	1932	1923	1922	1921	1920	1919	1918	1917	1916	1915	1914	1913	1912	1911	1910	1909
Jan.																				
Feb.																				
Mar.																				
April																				
May																				
June																				
July																				
Aug.																				
Sept.		x																		
Oct.		x																		
Nov.		x																		
Dec.		x																		
Total																				

Special Instructions for August and September, 1935: Check pay roll for second half of August 1935; if name is *not* found on this pay roll, check pay roll for *first* half of August. Check pay roll for *first* half of September 1935; if name is *not* found on this pay roll, check pay roll for *second* half of September. Do not make an entry in more than one block for each of the two months.

Note.—(*a*) Line out spaces for all months for which entries have not been made.
(*b*) Only 30 service years are required for verification.

Section 10.—Certification

All information or data reported on this form in Sections 3, 4, 5, 6, 7 and 9, are furnished at the request of the Railroad Retirement Board for official use and are correct to the best of my knowledge and belief. No alterations, interlineations or erasures appear in this report except as noted above under "*Additional information,*" or as initialed by me.

/s/ H. E. ALSING,
Chief Clerk, Secretary Board of Pensions.

Date December 28, 1946.

Note:—The official concerned shall date and sign as to the correctness of all entries.

Jan 13 1947

Mr. Walter Francis J. Shelley

258 North Avenue 49

Los Angeles, California

In reply refer to
R.R.B. No. A-38554

Dear Sir:

This will acknowledge your letter of December 28, 1946, regarding your application for an annuity pursuant to the Railroad Retirement Act.

We have investigated the additional service that you have claimed, and have made every effort to verify same. However, the Southern Pacific Company reported that they have no record of the service which you claimed from Fall of 1936 through December 1936.

It is noted in a memorandum dated November 8, 1946, from our field representative in Los Angeles that you have communicated with the treasury department of the company in San Francisco, inquiring as to whether they might have a check receipt sheet or any other information establishing that you received payment for the additional service claimed.

In order that a final determination may be expedited, please furnish this Bureau with any further information you may have to substantiate your claim.

Further adjudication will not be made on your

application until your reply to this letter has been received.

Very truly yours,

John W. Callender
Director of Retirement
Claims

Jan 22 1947

Mr. Walter Francis John Shelley
258 North Avenue
Los Angeles 49, California

In reply refer to
R.R.B. No. A 38554

Dear Sir:

Reference is made to your application for an annuity pursuant to the Railroad Retirement Act and your letters of recent date.

An amendment to the Act of 1937 which was approved on July 31, 1936, re-defined the term "employment relation." Under this amendment an individual is generally considered to have an employment relation on August 29, 1935, under any of the following conditions:

(1) If he was on August 29, 1935, on a leave of absence from his employment which was expressly granted to him by his employer and that leave of absence is proved to the satisfaction of the Board before July 1, 1947.

(2) If he returned to service after August 29,

1935, and worked in at least six different calendar months before January 1, 1946.

(3) If he did not retire and was not retired or discharged before August 29, 1935, but

(a) he had stopped work before August 29, 1935, because of disability and continued to be disabled until age 65 or until August 1, 1945, whichever event first occurred; or

(b) he was not called back to service between August 28, 1935 and August 1, 1946, because of disability; or

(c) he was called back to service between August 28, 1935 and August 1, 1945, but was unable to work in at least six different calendar months before January 1, 1946, because of disability.

As stated in our letter of January 13, 1947, we have investigated and made every effort to verify additional service that you have claimed with the Southern Pacific Company. Before we can request that the company make a recheck in your case, it will be necessary that you furnish this office with further evidence of your service, setting forth all pertinent information relative thereto such as exactly where you worked and by whom you were paid. It is also requested that any evidence such as pay vouchers, time books, or documents of similar nature be furnished, if possible.

We have been able to verify that you rendered three months of service subsequent to August 29, 1935. If you have additional service to claim and further information to substantiate same, it is requested that you submit this data at the earliest

practical date in order that a final determination may be expedited in your case.

Further adjudication will be made on your application when the above requested information has been received.

Very truly yours,

John W. Callender
Director of Retirement
Claims

Sparks, Nevada, May 16, 1945

To Whom It May Concern:

Some years ago and I am quite sure that it was during the early part of 1936, Mr. W. F. Shelly whom we had known as agent at Wabuska, Nevada, called upon us in this office and claimed that he was seeking employment as a telegrapher.

Yours truly,

/s/ A. D. Radcliffe

Southern Pacific Company, Manager Telegraph Office, Sparks, Nevada

Southern Pacific Company

Southern Pacific Passenger Station, Reno, Nevada
Phone Dial 7183.

A-38554

T. Bergerson,
District Freight & Passenger Agent,
Reno, Nevada.

May 6th 1945.

To whom it may concern:

This is to certify that in the early part of the year 1936, I conferred with Mr. W. F. Shelley at Reno on his visit to the station, apparently seeking employment with our Company at that time.

Yours very truly,

T. Bergerson,

———

Feb 18 1947

Mr. J. S. Cunningham, Secretary,
Board of Pensions
Southern Pacific Company
65 Market Street
San Francisco 5, California

In reply refer to
R.R.B. No. A-38554

Dear Sir:

Reference is made to the application for an annuity pursuant to the Railroad Retirement Act filed by Mr. Walter Francis John Shelley, who was for-

merly employed as an agent-telegrapher in the operating department, California Division.

Prior to the approval of the 1946 amendments to the Act, the Bureau of Retirement Claims made the determination that Mr. Shelley did not have an employment relation on the basis of the report furnished by your company that he last performed service Nov. 25, 1930, and that he ceased having any seniority rights upon the expiration of a furlough period of six months.

Mr. Shelley appealed our decision and the case was taken into court. Before the court, the claimant introduced new evidence resulting in the case being dismissed in order that proper investigation of such evidence could be made. Inasmuch as we are now endeavoring to make a final determination in accordance with the amended employment relation provisions of the Act, considerable correspondence has transpired between the applicant and this Bureau. Excerpts from statements on file made under oath in the United States District Court, Southern District of California, follow:

Q. Proposed by Mr. Shelley who prosecuted in his behalf: Do you remember the last time I worked here [Firestone Park] in 1935?

A. Witness: You were here in 1933 and once or twice as a relief agent after that date in 1934 and 1935.

* * *

Q. Proposed by Mr. Shelley: Do you remember the time that I was there?

A. Witness: In 1933.

Mr. J. S. Cunningham R.R.B. No. A-38554

Q. I was there how long?

A. 1933 to 1935, three years.

Q. Do you remember what kind of work I did at Firestone Park?

A. Telegrapher and general station work.

Q. Do you know what I did down there; who I relieved?

A. The night man, the night telegrapher and clerk.

* * *

Q. Proposed by the Board: Do you remember what day it was he relieved you?

A. Witness: Just about September 10th.

Q. What year? A. 1935.

* * *

Q. Proposed by the Board: Please state the month and year Mr. Shelley worked at Ventura.

A. Witness: About October 1935.

The applicant has claimed further service with your company as set forth below:

Night Telegrapher from November 21, 1935 to December 1, 1935, operating department Ventura, California.

Engine Wiper and sweep roundhouse between fall 1936 and winter 1936, N of E department Sparks, Nevada.

Stenographer between January 1937 and March 1937, freight traffic department Los Angeles, California.

Three months of subsequent service claimed by

the applicant with the Virginia and Truckee Railway Company have been verified by our Bureau of Wage and Service records. Thus, it is necessary that the claimant be credited with only three months of additional service performed after August 29, 1935, in order that an employment relation may be established in his case.

A recent memorandum from our Field Representative in Los Angeles states that Mr. Shelley has communicated with the treasury department of your company in San Francisco, inquiring as to whether they might have a check receipt sheet, to establish that he received payment for the additional service claimed. The Board has no knowledge that your company made a reply to the applicant's inquiry to date; however, we realize the possibility that Mr. Shelley may have been paid by the individuals whom he may have relieved and therefore, his name would not appear on the pay rolls.

In view of the information summarized in this letter, it is requested that a thorough investigation be made in order to verify the additional service claimed by the applicant. The enclosed Form AA-2P should be returned with a definitive annotation thereon under section 9.

Your continued cooperation in this matter will be greatly appreciated.

Very truly yours,

John W. Callender
Director of Retirement
Claims

Aug. 29, 1947

Mr. Walter Francis John Shelley
258 North Avenue
Los Angeles 49, California

In reply refer to
R.R.B. No. A-38554

Dear Sir:

This has reference to your application for an annuity, pursuant to the Railroad Retirement Act.

In order to be eligible to receive an annuity under the Act, based in whole or in part upon service performed prior to January 1, 1937, it is necessary, in addition to meeting certain other requirements regarding age, service or disability, that an individual qualify as an employee by having been on August 29, 1935, in the active compensated service of, or in an employment relation to, an employer as defined in the Act.

The Railroad Retirement Act of 1937 was amended on July 31, 1946, changing the definition of the term "employment relation." Under these amendments, an individual shall be deemed to be in an employment relation on August 29, 1935, if he fulfills one of the three following provisions:

1. He was on that date on leave of absence from his employment, expressly granted to him by the employer by whom he was employed, or by a duly authorized representative of such employer, and the grant of such leave of absence will have been established to the satisfaction of the Board before July 1947.

2. He was in the service of an employer after the enactment date and before January 1946 in each of six calendar months, whether or not consecutive.

3. Before the enactment date he did not retire and was not retired or discharged from the service of the last employer by whom he was employed, or its corporate operating successor, but

(a) solely by reason of his physical or mental disability he ceased before the enactment date to be in the service of such employer and thereafter remained continuously disabled until he attained age sixty-five or until August 1945, or

(b) solely by reason of his mental or physical disability, an employer by whom he was employed before the enactment date or an employer who is its successor did not, on or after the enactment date and before August 1945, call him to return to service, or

(c) if he was so called, he was solely for such reason unable to render service in six months as provided above.

We regret to advise that you do not qualify in accordance with any of the foregoing, inasmuch as the Southern Pacific Company reported that you were furloughed on account of reduction in force November 25, 1930; that your record was closed in May 1931 when you lost all seniority rights upon the expiration of a six-month furlough period

under the agreement in effect with the labor organization concerned; and that you did not, therefore, maintain any rights to a position on August 29, 1935. We requested this carrier to make a careful search of their records in an effort to obtain verification of the additional service claimed by you after August 29, 1935 at Ventura and Los Angeles, California, and Sparks, Nevada. An extensive investigation conducted by the Southern Pacific Company, involving the perusal of their pay rolls, disclosed that your name does not appear thereon for the periods which you have claimed. Since you could not exercise any rights to a position with an employer in the railroad industry on the enactment date, the only provision under which you could have qualified as having an employment relation would have been condition 2 set forth herein. The Virginia and Truckee Railway Company reported that you rendered only 3 months of service in the year of 1938. As this is all the subsequent service that could be established for you by this Bureau, we have no alternative other than to hold that you do have an employment relation within the meaning of the Act as you did not perform service in 6 different calendar months between August 29, 1935 and January 1, 1946.

On the basis of the evidence in your case and the provisions of law outlined above, the Bureau of Retirement Claims has no alternative other than to hold that you did not have an employment relation on August 29, 1935, and are ineligible to receive

credit for service performed prior to January 1, 1937. Therefore, the full amount of the annuity benefits to which you are entitled is the lump-sum payment of $20.47 that was based on the service that you performed after December 31, 1936, which was awarded to you as per our explanatory letter of September 30, 1939.

You have a right to appeal to the Appeals Council of the Board if you do not agree with the decision on your claim. An appeal must be submitted on the form provided by the Board and must be received at an office of the Board within one year from the date of this letter.

Very truly yours,

JOHN W. CALLENDER,
Director of Retirement
Claims.

Nov. 6, 1947

Mr. Walter Francis John Shelley
258 North Avenue
Los Angeles 49, California

In reply refer to
R.R.B. No. A-38554

Dear Sir:

This will acknowledge receipt of your letter dated October 17, 1947, expressing dissatisfaction with the decision of the Bureau of Retirement Claims on your claim for benefits under the Railroad Retirement Act.

If it is your desire to file an appeal from the decision of the Bureau of Retirement Claims, it is necessary that you execute and file the enclosed Form AC-1. A copy of the Board's appeal regulations is also enclosed.

If you wish, you may appear before the Appeals Council in person or by representative to present your case. If you desire such a hearing, please so state at the time you file your appeal. If you do not wish a hearing, all evidence and information you may have to support your appeal should be forwarded to the Railroad Retirement Board with Form AC-1. Unless a request for a hearing is received, the Council will proceed to a final determination of your claim upon receipt of Form AC-1.

Very truly yours,

JOHN W. CALLENDER,
Director of Retirement
Claims

Dec. 23, 1947

Mr. Walter Francis John Shelley
258 North Avenue
Los Angeles 49, California

In reply refer to
R.R.B. No. A-38554

Dear Sir:

Reference is made to your letter of December 6, 1947 concerning the service you performed before January 1, 1937.

As requested, we are enclosing another copy of Form AC-1. A copy of the Board's appeal regulations is also enclosed. The decision of the Bureau of Retirement Claims in your case is contained in our letter of August 29, 1947.

If you wish, you may appear before the Appeals Council in person or by representative to present your case. If you desire such a hearing, please so state at the time you file your appeal. If you do not wish a hearing, all evidence and information you may have to support your appeal should be forwarded to the Railroad Retirement Board with Form AC-1. Unless a request for a hearing is received, the Council will proceed to a final determination of your claim upon receipt of Form AC-1.

Very truly yours,

/s/ GORMAN,

JOHN W. CALLENDER,
Director of Retirement
Claims

Mar. 10, 1948

Mr. J. S. Cunningham, Secretary
Board of Pensions

Southern Pacific Company
65 Market Street,
San Francisco 5, California

In reply refer to
R.R.B. No. A-38554

Walter Francis J. Shelley
Dear Sir:

Reference is made to your letter of August 8, 1947 concerning the case of Walter Francis John Shelley and to our letter of February 18, 1947.

Your letter of August 8, 1947 states that records were checked at Ventura, California and at Sparks, Nevada but it does not indicate whether a check was made of the records at Firestone Park, California. Mr. Shelley claims the service outlined on the enclosed Form AA-2P. He also claims that he was in compensated service on August 29, 1935.

Since this claim is in an appeal status, it would be appreciated if you would check the claim outlined on the enclosed Form AA-2P at the earliest possible date.

Very truly yours,

/s/ GORMAN,

JOHN W. CALLENDER,
Director of Retirement
Claims

April 14, 1948

Mr. John W. Callender
Director of Retirement Claims

Railroad Retirement Board
844 Rush Street
Chicago 11, Illinois

Dear Sir:

Referring to your letter of March 10, 1948, concerning annuity application A-38554 of Walter Francis J. Shelley.

While Mr. Shelley claims service as Agent-Telegrapher at Firestone Park, California, during the years 1934 and 1935, we are unable to locate such an Agency on our pay rolls during those years. We are now having our Superintendent at Los Angeles investigate the matter, and it is hoped that we can make a reply to your letter within the next ten days or two weeks.

Yours very truly,

/s/ J. S. CUNNINGHAM,

Social Security Account No. 710 - 10 - 8543
R. R. B. No. A-38554

Record of Employee's Prior Service

Section 1.—Identification

Concerning prior service claimed under the Railroad Retirement Act by—
(Last name) Shelley (First name) Walter Francis (Middle name) John
258 North Avenue 49 Los Angeles 42 Los Angeles County California
who states that he served with the employer or its predecessor as shown in section 2 herein.

Section 2.—Employee's Claimed Service

(Employer) Southern Pacific Company

Name on pay roll Shelley W. Frank

	Name of Employer if Not Same as Above	Occupation	Date Began (Month, year)	Date Ended (Month, year)	Department	Location or Division
1	Same	Telegrapher Agent	1934	9–1935		Firestone Park, California

Section 6.—Service Record

Employer records indicate the employee named herein received compensation in each of the months marked "C" in the following table, that his name did not appear on the pay roll or other detailed compensation records in the months marked "X," and that records for months marked "M" are not available:

	1936	1935	1934	1933	1932	1923	1922	1921	1920	1919	1918	1917	1916	1915	1914	1913	1912	1911	1910	1909
Jan.		x	x																	
Feb.		x	x																	
Mar.		x	x																	
April		x	x																	
May		x	x																	
June		x	x																	
July		x	x																	
Aug.		x	x																	
Sept.		x	x																	
Oct.		x	x																	
Nov.		x	x																	
Dec.		x	x																	
Total																				

Special Instructions for August and September 1935.—Check pay roll for second half of August 1935; if name is *not* found on this pay roll, check pay roll for *first* half of August. Check pay roll for *first* half of September 1935; if name is *not* found on this pay roll, check pay roll for *second* half of September. Do not make an entry in more than one block for each of the two months.

Note.—(*a*) Line out spaces for all months for which entries have not been made.
(*b*) Only 30 service years are required for verification.

Section 9.—Additional Information

1. Applicant's name could not be located on Los Angeles Division, Transportation Department pay rolls dur-
2. ing perior claimed. Am enclosing copy of letter from Mr. H. R. Gernreich, Superintendent of this Company at
3. Los Angeles, indicating that Mr. Shelly was not employed during period in question.

Section 10.—Certification

All information or data reported on this form in sections 3, 4, 5, 6, 7, and 9, are furnished at the request of the Railroad Retirement Board for official use and are correct to the best of my knowledge and belief. No alterations, interlineations, or erasures appear in this report except as noted above under *"Additional information,"* or as initialed by me.

/s/ J. S. CUNNINGHAM,
Secretary Board of Pensions.

Date April 26, 1948

Note.—The official concerned shall date and sign as to the correctness of all entries.

LA PR
Los Angeles, April 21, 1948

Mr. J. S. Cunningham:

Your letter of April 14th in connection with the retirement of Walter Francis Shelley:

In December, 1946, a careful check was made of our pay rolls covering the month of August and September 1935, which failed to reveal that Mr. Shelley performed any service for this Company during either of these months and he was so informed by letter December 17, 1946.

Firestone Park was under the jurisdiction of Los Angeles Agent and position was filled during this period by R. Riggs. Mr. Shelley also claimed to have worked at Santa Susana during September, 1935, but this position was filled during the entire period by R. C. Sims.

There is nothing in our files to indicate that he performed any service for this Company after being cut off in November, 1930.

/s/ H. R. GERNREICH.

Copy

November 29, 1948.

Mr. Walter Francis J. Shelley
258 North Avenue 49
Los Angeles 42, California

In reply refer to
R.R.B. No. A-38554

Dear Sir:

Enclosed is a copy of the decision of the Appeals Council in the above-styled case.

It is regretted that a more favorable decision cannot be rendered.

Very truly yours,

HALBERT W. DODD,
Chairman, Appeals Council.

Enclosure

Copy to: Mr. Charles B. McGinnis, Esq.
318 Fay Building
126 West Third Street
Los Angeles, California

HWD:DA

[Endorsed]: No. 12411. United States Court of Appeals for the Ninth Circuit. Walter Francis John Shelley, Petitioner, vs. United States of America Railroad Retirement Board, Respondent. Appendix to Brief of Respondent. (Excerpts from Transcript of Record.) Petition for Review of Decision of the United States of America Railroad Retirement Board.

Filed December 2, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States
Court of Apeals for the Ninth
Circuit.

No. 12411

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT.

WALTER FRANCIS JOHN SHELLEY,
Petitioner,

vs.

RAILROAD RETIREMENT BOARD,
Respondent.

ON PETITION FOR REVIEW OF DECISION OF THE RAILROAD RETIREMENT BOARD.

BRIEF OF RESPONDENT

MYLES F. GIBBONS,
General Counsel,
DAVID B. SCHREIBER,
Associate General Counsel,
Railroad Retirement Board,
Attorneys for Respondent.

LOUIS TURNER,
BEN DIAMOND,
Attorneys, Railroad Retirement Board,
Of Counsel.
844 Rush Street,
Chicago, Illinois.

THE GUNTHORP-WARREN PRINTING COMPANY, 210 WEST JACKSON, CHICAGO

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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT.

No. 12411

WALTER FRANCIS JOHN SHELLEY,
Petitioner,

vs.

RAILROAD RETIREMENT BOARD,
Respondent.

ON PETITION FOR REVIEW OF DECISION OF THE RAILROAD RETIREMENT BOARD.

BRIEF OF RESPONDENT.

JURISDICTION.

This proceeding seeks review of a decision of the Appeals Council of the Railroad Retirement Board, the Board being an independent agency in the executive branch of the United States government. Section 10(a) of the Railroad Retirement Act of 1937 (50 Stat. 314; 45 U. S. C., 1946 Ed., § 228j(a)). The decision of the Appeals Council

(Pet. R. 591, 592),[1] an intermediate appellate body of the Board, rendered on November 29, 1948, held that petitioner was not entitled to credit for service prior to January 1, 1937, toward an annuity under the Railroad Retirement Act of 1937 (50 Stat. 307, as amended by 60 Stat. 722; 45 U. S. C., 1946 Ed., §§ 228a-228s). Section 11 of the Railroad Retirement Act of 1937, as amended July 31, 1946 (50 Stat. 315, as amended by 60 Stat. 735; 45 U. S. C., 1946 Ed., § 228k) incorporates by reference the provisions of Section 5(f) of the Railroad Unemployment Insurance Act (52 Stat. 1100, as amended by 60 Stat. 738; 45 U. S. C., 1946 Ed., § 355(f)), which provides that any claimant aggrieved by *a decision of the Board* may obtain a review of the decision by filing a petition for review in the United States Court of Appeals for the Circuit in which he resides, for the Seventh Circuit, or for the District of Columbia. For the reasons set forth in Point I of the Argument, *infra,* the Court lacks jurisdiction, since the decision complained of is not a decision of the Board.

1. References in this form, Pet. R., are to the pages of the typewritten portions of the record designated by the petitioner.

STATEMENT OF CASE.

An individual age sixty-five is eligible for an annuity under the Railroad Retirement Act of 1937 if he was an "employee" on or after August 29, 1935, the "enactment date" as that term is used in the Act. Section 2(a) (45 U. S. C., 1946 Ed., § 228b(a)); Section 1(j) (45 U. S. C., 1946 Ed., § 228a(j)). An individual may, however, receive credit toward an annuity for service rendered before 1937 (the first year as of which taxes for railroad retirement purposes became payable)[2] only if he was an "employee" on August 29, 1935. Section 3(b)(1) and (2), (45 U. S. C., 1946 Ed., § 228c(b)(1) and (2)).[3]

This requirement of an "employee" status on August 29, 1935, in order to receive credit for service prior to 1937 is, so far as is here relevant, met only if the applicant was *on that date* in the active service of an "employer" (generally described as a railroad or railroad controlled company) or in an "employment relation" to an "employer." Section 1(b) and (c) (45 U. S. C., 1946 Ed., § 228a(b)(c)).[4]

2. A companion statute, the Railroad Retirement Tax Act (50 Stat. 435, as amended by 60 Stat. 722; 26 U. S. C., 1946 Ed., §§ 1500-1538), whose coverage provisions are identical with those of the Railroad Retirement Act, taxes employers and employees only with respect to compensation after 1936.

3. Section 3(b)(1) and (2) provide:

"The years of service of an individual shall be determined as follows: (1) In the case of an individual who was an employee on the enactment date, the years of service shall include all his service subsequent to December 31, 1936 and if the total number of such years is less than thirty, then the years of service shall also include his service prior to January 1, 1937, but not so as to make his total years of service exceed thirty. * * *

"In all other cases, years of service shall include only the service subsequent to December 31, 1936."

4. Section 1(b) provides: "The term 'employee' means (1) any individual in the service of one or more employers for compensation, (2) any individual who is in the employment relation to one or more employers, and (3) an employee representative * * *".

Section 1(c) provides: "An individual is in the service of an employer * * * if (i) he is subject to the continuing authority of the employer to

An individual is deemed to have an employment relation on August 29, 1935, if in six calendar months between that date and January 1946 he was in the active service of an employer. Section 1(d) (45 U. S. C., 1946 Ed., § 228a(d)).[5]

The question presented in the proceedings before the Appeals Council of the Board was whether the petitioner was entitled to credit toward an annuity for service prior to January 1, 1937 on the basis of having been in the service of an employer on or after August 29, 1935, with regard to his claimed service for the Southern Pacific Company on that date and during the latter part of 1935 and 1936 and the first quarter of 1937.

A. PROCEEDINGS UNDER THE RAILROAD RETIREMENT ACT PRIOR TO THE JULY 31, 1946 AMENDMENTS.

In a letter dated November 14, 1936, petitioner requested the Board to send him application forms, stating that he had worked for the Southern Pacific Company, and that "they turned me off in 1931, after promising me that when times improved, I would be re-employed and allowed all my seniority rights. This they have never done * * *"

supervise and direct the manner of rendition of his service, or he is rendering professional or technical services and is integrated into the staff of the employer, or he is rendering, on the property used in the employer's operations, other personal services the rendition of which is integrated into the employer's operations and (ii) he renders such service for compensation * * *".

5. Section 1(d) provides: "An individual shall be deemed to have been in the employment relation to an employer on the enactment date if * * * (ii) he was in the service of an employer after the enactment date and before January 1946 in each of six calendar months, whether or not consecutive; * * *".

Prior to the 1946 amendments, an employment relation was defined in section 1(d) of Act (50 Stat. 308) as follows:

> "An individual is in the employment relation to an employer if he is on furlough, subject to call for service within or outside the United States and ready and willing to serve, or on leave of absence, or absent on account of sickness or disability, all in accordance with the established rules and practices in effect on the employer; * * *".

(App. 1).[6] On January 11, 1937, petitioner filed with the Board an application for annuity under the Railroad Retirement Act asserting that he was not then employed by a carrier and that he last worked for a carrier, the Southern Pacific Company, in 1932 (App. 3). He further stated in the application that the Southern Pacific Company promised that "when times got better I would be sent for. They never sent. They cancelled my annual pass, my insurance; and all my rights * * *" (App. 4). In reply to a Board questionnaire, petitioner, on February 9, 1937, again declared that he had not worked for a railroad since the fall of 1931 or 1932, and that he was on leave on and after August 29, 1935 because the Southern Pacific Company would not give him work (App. 4, 5). On November 22, 1937, the Southern Pacific Company reported that petitioner, as of August 29, 1935, was not on furlough, leave of absence, absent on account of sickness or disability, or subject to call for service. The company also stated that petitioner's "last compensated service [was] performed November 25, 1930" and that he "lost rights to return to service after being off six months" (App. 5, 6).

By letter of May 4, 1938 petitioner informed the Board that he had secured employment with the Virginia and Truckee Railway (App. 7, 8), and on June 23, 1938 he filed another application for an annuity under the Railroad Retirement Act claiming service with that railway from April to June 1938 (Pet. R. 35, 36). On September 30, 1939, the initial adjudicating unit of the Board, then known as the Division of Retirement Claims, rendered a decision awarding petitioner an annuity under the Railroad Retirement Act of 1937 in the sum of $.17 a month based on 2 months of service rendered by him for the Virginia and Truckee Railway prior to May 24, 1938, the date he at-

6. References in this form, App., are to the pages of the appendix to respondent's brief containing portions of the record designated by the respondent Board.

tained sixty-five years of age (Pet. R. 191). On November 8, 1939, petitioner's claim was, at his request, reopened for further investigation (App. 16). Additional information was secured from the Southern Pacific Company to the effect that petitioner was not in active service and did not have rights to return to service on August 29, 1935 (App. 18, 19, 20, 21). Petitioner was advised by Retirement Claims on January 2, 1940, that he was not entitled to an annuity based on service performed prior to January 1, 1937, and that he had a right to appeal such disallowance to the Appeals Council of the Board within one year (App. 23, 24).[7]

Disregarding such right to appeal, petitioner, on March 18, 1940, commenced an action in the United States District Court for the Southern District of California to compel the Board to grant him an annuity based on his service prior to January 1, 1937.[8] Upon motion of the Board, the court on September 30, 1940, dismissed the case "without prejudice to the filing of another action after plaintiff shall have exhausted his remedies before said Railroad Retirement Board."

Thereafter petitioner appealed to the Appeals Council of the Board (App. 24, 25) and on September 29, 1941, the Appeals Council sustained the decision of the Division of Retirement Claims (App. 26-35). Upon appeal to the Board itself, the Board on October 12, 1943, affirmed the decision of the Appeals Council and held that petitioner was not entitled to credit toward his annuity for service rendered prior to January 1, 1937, because his status as

7. Section 260.2(b) of the Board's Regulations (20 CFR 260.2(b)) then provided and still provides that appeals from initial decisions of the Bureau of Retirement Claims must be filed with the Appeals Council within one year from the date upon which notice of the initial decision was mailed to the applicant.

8. *Walter Francis John Shelley, complainant* v. *The Railroad Retirement Board, et al., defendants* (U. S. D. C., S. D. Cal., Central Div.), Civil Action No. 843-M.

an employee for the Southern Pacific Company terminated July 1, 1931, and he had no status as an employee with any other "employer" until April 1938 when he was employed by the Virginia and Truckee Railway (App. 39-59; Pet. R. 390, 391).

Almost a year after such decision by the Board, petitioner, on September 7, 1944, instituted another action against the Board in the United States District Court for the Southern District of California seeking to set aside the Board's decision on the ground that he possessed an employment relation on August 29, 1935, under the Act because he had on that date rights to return to the service of the Southern Pacific Company.[9] At a preliminary hearing in the case on November 20, 1945, petitioner for the first time raised the contention that he was in the active service of the Southern Pacific Company on and after August 29, 1935. When the action came up for trial on April 2, 1946, petitioner requested the court to dismiss the action, and stated that he would petition the Board to exercise its discretionary authority to reopen his case and consider his claimed service for the Southern Pacific Company on and after August 29, 1935. The court, on April 29, 1946, entered an order dismissing the action without prejudice to all parties concerned (Pet. R. 393, 402-407).

B. PROCEEDINGS AFTER THE JULY 31, 1946 AMENDMENTS TO THE RAILROAD RETIREMENT ACT.

Petitioner requested a reopening of the adjudication of his annuity and submitted depositions of several individuals in support of his claim that he was in the active service of the Southern Pacific Company on August 29, 1935, as well as during the months of September and October of that year (Pet. R. 394-400, 409-428). Petitioner later sub-

9. *Walter Francis J. Shelley, plaintiff* v. *Railroad Retirement Board, defendant* (U. S. D. C., S. D. Cal., Central Div.), Civil Action No. 3845-PH.

mitted additional statements and broadened his claim of actual service to the Southern Pacific Company to cover the entire latter half of 1935 and 1936 as well as the period from January to March 1937 (Pet. R. 430, 440, 441, 445, 509, 510, 570-572; App. 61-67, 75, 76). Petitioner's claim for an annuity was reopened by the Board's Bureau of Retirement Claims (App. 59, 60), and his contention that he was in the active service of the Southern Pacific Company on and after August 29, 1935, was examined in the light of the July 31, 1946 amendments to the Act which, as previously indicated (Footnote 5, *supra*), amended Section 1(d) of the Act so as to confer an employment relation upon an individual who performed actual service for an employer in six calendar months between August 29, 1935 and January 1946.

The personnel records of the Southern Pacific Company were exhaustively investigated, and the company completed and returned three separate questionnaires signed by responsible officials in which it reported that petitioner was not in its service during the periods claimed by petitioner on and after August 29, 1935 (App. 69-74, 79-81, 97-99). The company also furnished identifications of the individuals who, during these periods, occupied the positions in which petitioner claimed to have worked, and the petitioner's name was not included (Pet. R. 545, 546; App. 100). Petitioner having stated that he was paid for the claimed service by the Southern Pacific Company in the regular manner (Pet. R. 457-458; Petitioner's Brief, pp. 16-17), files and pay-roll records were especially checked by Mr. J. S. Cunningham, Secretary of the Board of Pensions, and Mr. H. R. Gernreich, Superintendent at Los Angeles, and both reported that the records failed to reveal the service claimed by petitioner on and after August 29, 1935, Mr. Gernreich stating that "there is nothing in our files to indicate that he [petitioner] per-

formed any service for this company after being cut off in November 1930'' (App. 96-100). A search of current wage reports filed by employers with the Board covering service after January 1, 1937, revealed three months of service performed for the Virginia and Truckee Railway from April to June, 1938, but no service for the Southern Pacific Company from January to March, 1937, as claimed (App. 77).

On the basis of all the evidence in the case the Bureau of Retirement Claims on August 29, 1947, found that petitioner was not eligible to receive credit for service performed prior to January 1, 1937, because he was not in the active service of an employer on August 29, 1935, and since he had not performed service for an employer in six calendar months between that date and January 1, 1946, he did not possess an employment relation to an employer on that date (App. 89-92). Petitioner was advised of his right to appeal to the Appeals Council and to appear before that body, copies of the appeal regulations being furnished on two occasions (App. 92, 93, 94). Petitioner appealed to the Appeals Council (Pet. R. 556, 572), and on November 29, 1948, the Appeals Council sustained the decision of the Bureau of Retirement Claims (Pet. R. 591, 592).

Ignoring his right to appeal to the Board itself, within the time and in the manner provided by the Board's Regulations,[10] petitioner instituted an action against the Board in the United States District Court for the Southern District of California to review the Appeals Council decision.[11] After advice from the General Counsel of the Board

10. Section 260.3(b) of the Board's Regulations (20 CFR 260.3(b)) provides that such appeal must be filed with the Board within four months from the date upon which notice of the decision by the Appeals Council is mailed to the applicant.

11. *Walter Francis John Shelley, plaintiff* v. *U. S. Railroad Retirement Board, defendant* (U. S. D. C., S. D. Cal., Central Div.), Civil Action No. 10,518-PH.

that jurisdiction to review Board decisions had been transferred from the United States District Courts to the United States Courts of Appeals by amendments to the Act of July 31, 1946, and also that petitioner had failed to exhaust his administrative remedies, petitioner on or about November 29, 1949, commenced this proceeding.

SUMMARY OF ARGUMENT.

I.

The Court lacks jurisdiction of this proceeding because of petitioner's failure to exhaust his administrative remedies before the respondent Board.

Section 11 of the Railroad Retirement Act, as amended in 1946, incorporates Section 5(f) of the Railroad Unemployment Insurance Act, as amended, and thereby specifically provides that judicial review may be obtained "only after all administrative remedies within the Board will have been availed of and exhausted." Moreover, Section 11 authorizes judicial review of "decisions of the Board" which includes only decisions rendered by the Board members as a Board. It is clear from Section 10 of the Railroad Retirement Act that Congress contemplated the establishment of an appellate procedure within the Board and did not intend the term "decisions of the Board" to cover decisions rendered by employees of the Board. By confining judicial review to decisions rendered by the Board itself, Congress assured expertness in judgment and uniformity of decision. The decision of which review is sought in this proceeding is a decision of the Appeals Council, an intermediate appellate body composed of employees of the Board. It is not a final decision of the Board itself. The four-month period within which such Appeals Council decision could be appealed to the Board has expired. The administrative remedy available to petitioner was adequate and the time allowed for taking an appeal to the Board was reasonable. Petitioner's contention that an appeal to the Board would be "useless" is not sufficient to excuse his failure to seek that relief. Peti-

tioner did not pursue his claim to a conclusion before the Board and therefore did not exhaust all administrative remedies available before the Board. Accordingly, the Court lacks jurisdiction of this proceeding.

II.

Even were the Appeals Council decision considered a decision of the Board, such decision should not be set aside since it is supported by the evidence and has a reasonable basis in law.

A. Decisions of the Board are not to be disturbed if they are supported by the evidence and have a reasonable basis in law.

Section 11 of the Railroad Retirement Act, as amended in 1946, incorporates Section 5(f) of the Railroad Unemployment Insurance Act as amended and thereby specifically provides that on judicial review "the findings of the [Railroad Retirement] Board as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive." The courts have held that these provisions, as well as earlier less restrictive provisions, limit judicial review and require that findings of the Board are not to be disturbed if supported by evidence.

B. The decision of the Appeals Council that petitioner was not on August 29, 1935 in the service of, or in an employment relation to an employer, and therefore was not entitled to credit for service prior to January 1, 1937, toward an annuity is supported by the evidence and has a reasonable basis in law.

The evidence of record amply supports the finding of the Appeals Council that petitioner was not in the active service of an "employer" on August 29, 1935, or in an employment relation to an employer on that date by reason of six months of active service between that date and Janu-

ary 1, 1946. Petitioner has established only three months of service, in 1938, with the Virginia and Truckee Railway. The record clearly shows that petitioner was not in the active compensated service of the Southern Pacific Company on or after August 29, 1935. The records of the railroad which were carefully checked, as well as the statements and actions of petitioner at the time he filed his application in 1937 and thereafter until the latter part of 1945, establish beyond question that petitioner last performed active service for the railroad prior to 1935. The depositions, affidavits and statements submitted by petitioner after 1945 to the effect that he performed active service for the company on and after August 29, 1935, are vague, indefinite and unreliable.

The weight to be accorded the evidence and the inferences to be drawn therefrom are matters to be determined by the Board. Even if conflicting inferences were possible, the Board's exercise of judgment should not be disturbed where it is shown to have a rational basis. In the instant case, it is clear that the decision of the Appeals Council of the Board is correct.

ARGUMENT.

I.

THE COURT LACKS JURISDICTION OF THIS PROCEEDING BECAUSE OF PETITIONER'S FAILURE TO EXHAUST HIS ADMINISTRATIVE REMEDIES BEFORE THE RESPONDENT BOARD.

It is a general rule that an individual may not appeal to a court from an administrative decision unless he has exhausted all the remedies available to him within the administrative agency. *Aircraft and Diesel Corp.* v. *Hirsh,* 331 U. S. 752 (1947); *Macauley* v. *Waterman S. S. Corp.,* 327 U. S. 540 (1946); *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U. S. 41 (1938); *Red River Broadcasting Co.* v. *Federal Communications Commission,* 98 F. (2d) 282 (C. A. D. C. 1938), *cert. denied,* 305 U. S. 625 (1938); *La Verne Co-op. Citrus Ass'n* v. *United States,* 143 F. (2d) 415 (C. A. 9th, 1944); *Trans-Pacific Air Lines* v. *Hawaian Air Lines,* 174 F. (2d) 63 (C. A. 9th, 1949). The rule is succinctly stated by the Supreme Court of the United States in *Aircraft and Diesel Corp.* v. *Hirsch, supra,* at pp. 767-768, as follows:

> "* * * The doctrine, wherever applicable, does not require merely the initiation of prescribed administrative procedures. It is one of exhausting them, that is, of pursuing them to their appropriate conclusion, and correlatively, of awaiting their final outcome before seeking judicial intervention.
>
> "The very purpose of providing either an exclusive or an initial and preliminary determination is to secure the administrative judgment, either, in the one case, in substitution for judicial decision or, in the other, as foundation for or perchance to make unnecessary later judicial proceedings. Where Congress has clearly commanded that administrative judgment be taken

initially or exclusively, the courts have no lawful function to anticipate the administrative decision with their own, whether or not when it has been rendered they may intervene either in presumed accordance with Congress' will or because, for constitutional reasons, its will to exclude them has been exerted in an invalid manner. To do this not only would contravene the will of Congress as a matter of restricting or deferring judicial action. It would nullify the Congressional objects in providing the administrative determination. In this case these include securing uniformity of administrative policy and disposition, expertness of judgment, and finality in determination, at least of those things which Congress intended to and could commit to such agencies for final decision."

There can be no doubt that the rule applies to judicial review of proceedings before the Board. Section 11 of the Railroad Retirement Act of 1937, as amended July 31, 1946 (45 U. S. C., 1946 Ed., § 228k),[12] pursuant to which this proceeding is brought, incorporates the judicial review provisions of the Railroad Unemployment Insurance Act (Section 5(f) (45 U. S. C., 1946 Ed., § 355(f))) and thereby specifically provides that judicial review may be obtained in courts of appeals "only after all administrative remedies within the Board will have been availed of and exhausted."

Furthermore, only decisions of the Board itself are subject to judicial review. That the term "decisions of the Board" in Section 11 includes only decisions rendered by the members of the Board, as a Board, is shown by Section

12. Section 11 provides:
"Decisions of the Board determining the rights or liabilities of any person under this Act shall be subject to judicial review in the same manner, subject to the same limitations, and all provisions of law shall apply in the same manner as though the decision were a determination of corresponding rights or liabilities under the Railroad Unemployment Insurance Act except that the time within which proceedings for the review of a decision with respect to an annuity, pension, or lump-sum benefit may be commenced shall be one year after the decision will have been entered upon the records of the Board and communicated to the claimant."

10(b) 5 of the same Act (45 U. S. C., 1946 Ed., § 228j(b) 5) which immediately precedes Section 11 and provides:

> "The Board is authorized to delegate to any of its employees the power to make decisions on applications for annuities or death benefits in accordance with rules and regulations prescribed by the Board: *Provided, however,* That any person aggrieved by a decision so made shall have the right to appeal to the Board."

From this section it is clear that Congress contemplated the establishment of an appellate procedure within the Board and did not intend the term "decisions of the Board" contained in Section 11 to cover decisions rendered by employees of the Board. It drew a sharp distinction between decisions of the Board itself and decisions by employees of the Board and confined the judicial review provided by Section 11 to decisions rendered by the Board itself.[13]

Section 10(b) 5 was enacted to provide a method whereby the thousands of applications filed with the Board would first be sifted by employees of the Board so as to dispose of all cases except those which might be appealed to the Board; those cases which are appealed to the Board would again be sifted so as to reduce still further the number of cases which would be taken into court. Under this process, also, expertness in judgment and uniformity of decision are assured.[14]

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13. Additional support for the proposition that Congress meant to limit the phrase "decisions of the Board" to include only decisions rendered by the Board itself and not decisions of employees of the Board may be found in that part of Section 10(b) 4 (45 U. S. C., 1946 Ed., § 228j(b) 4) which reads as follows:

> "* * * Notice of a decision of the Board, *or of an employee thereof,* shall be communicated to the applicant in writing within thirty days after such decision shall have been made. * * *" (Emphasis supplied.)

14. Qualifications for membership on the Board specified by Section 10(a) of the Railroad Retirement Act (45 U. S. C., 1946 Ed., §228j(a)) insure that at least two of the three members of the Board shall have backgrounds of experience serving to familiarize them with the practices prevailing in the railroad industry. In addition, the Act requires that preference be given to persons with railroad experience in filling positions within the Board (Section 10(b) 4 (45 U. S. C., 1946 Ed., § 228j(b) (4)).

Accordingly, the Board has, by specific regulation, delegated to its employees power to make initial decisions upon applications for annuities (20 CFR 260.1) and has provided procedures within the Board by which appeals may be taken to an appellate body, also composed of employees of the Board, known as the Appeals Council (20 CFR 260.2). A decision of the Appeals Council may be appealed to the Board within four months from the date such decision is mailed to the applicant (20 CFR 260.3(a), (b)). Only when the Board has rendered a decision upon such appeal is there in existence a *decision of the Board* which can be reviewed by the courts.

Even before the amendments of July 31, 1946 to Section 11 of the Act (45 U. S. C., 1946 Ed., § 228k), which incorporated by reference the express condition imposed by Section 5(f) of the Railroad Unemployment Insurance Act (45 U. S. C., 1946 Ed., § 355(f)) that all administrative remedies within the Board be exhausted before judicial review may be obtained, the courts held that the decisions of the initial adjudicating unit and the intermediate appellate body established by the Board are not decisions of the Board itself and therefore are not reviewable. *Shaw* v. *Railroad Retirement Board,* 65 F. Supp. 73 (D. C., E. D. Wis., 1946); *Bruno* v. *Railroad Retirement Board,* 47 F. Supp. 3 (D. C., W. D. Pa., 1942); *Shelley* v. *Railroad Retirement Board* (D. C., Central Div. Cal., Civil Action No. 843-M, September 30, 1940). In *Shaw* v. *Railroad Retirement Board, supra,* the court, in dismissing the complaint, stated as follows (p. 75):

> "No 'action or decision of the Board' is here involved. The administrative process on plaintiff's application ended with the decision of the Appeals Council which, with the right of appeal to the Board being provided for, did not represent an 'action or decision of the Board.' Under Section 11, quoted above, it is obvious that a decision of the Appeals Council cannot

substitute for or be held as the equivalent of a decision of the Board itself. Until the Board has rendered a decision adverse to an applicant there is no basis under the law upon which the court's jurisdiction can rest. As the plaintiff failed to take an appeal to and secure a decision of the Board, he did not exhaust his administrative remedies, the prior exhaustion of which constitutes a condition precedent of lawful exercise of jurisdiction by this court, in cases under the Act."

The decision of which review is sought in this proceeding is a decision of the Appeals Council, the intermediate appellate body within the Board (Pet. R. 591, 592). It is not a final decision of the Board itself. The Appeals Council decision was mailed to petitioner on November 29, 1948 (App. 101). Petitioner filed no appeal from such decision to the Board, although he was fully informed of his right to file such an appeal.[15] The four-month period within which the Appeals Council decision could be appealed to the Board has expired (20 CFR 260.3(b)) and there is no right to further review of such decision by the Board (20 CFR 260.3(c)).[16] All the administrative remedies within the Board were not availed of and exhausted by petitioner before commencing this proceeding on or about November 29, 1949.

Since the administrative remedy available to petitioner was adequate and the time allowed for taking the appeal

15. On two occasions petitioner was furnished copies of the Board's Regulations governing appeals (App. 92, 93, 94). Such Regulations were, of course, published in the Federal Register (12 F. R. 1389-1390, as amended at 12 F. R. 1720). Moreover, in view of the dismissal of petitioner's first action against the Board (*Walter Francis John Shelley, complainant* v. *The Railroad Retirement Board, et al., defendants* (U. S. D. C., S. D. Cal., Central Div., Civil Action No. 843-M)) for failure to exhaust administrative remedies, it appears that petitioner was aware of the requirement that an appeal to the Board was necessary before judicial review could be granted.

16. Section 260.3(c) of the Board's Regulations (20 CFR 260.3(c)) provides as follows:

"The right to further review of a decision of the Appeals Council shall be forfeited unless formal final appeal is filed in the manner and within the time prescribed in this part."

to the Board was reasonable,[17] petitioner's failure to utilize fully the avenues of administrative review bars the judicial review sought in this proceeding; otherwise, a dissatisfied applicant could secure judicial review without exhausting his administrative remedies by the simple expedient of permitting the time for taking administrative appeal to the Board to lapse. *Yakus* v. *United States,* 321 U. S. 414 (1943); *First National Bank* v. *Weld County,* 264 U. S. 450 (1924); *McGregor* v. *Hogan,* 263 U. S. 234, 238 (1923); *Milheim* v. *Moffat Tunnel District,* 262 U. S. 710, 723 (1923); *Farncomb* v. *Denver,* 252 U. S. 7, 11 (1920); *Red River Broadcasting Co.* v. *Federal Communications Commission,* 98 F. (2d) 282, 287 (C. A. D. C., 1938), *cert. denied,* 305 U. S. 625 (1938).

In his petition for review, petitioner states that "after almost fourteen years of contest before said Board, and further contest being useless" he "regards his rights before the Board exhausted and asks for review of the entire matter."

At the outset it should be noted that the time lag between the filing of petitioner's application and the commencement of this proceeding was not occasioned by the Board. While it is true that the Board carefully and exhaustively considered petitioner's claim, allowing him unusual latitude, the undue delay charged by petitioner was caused primarily by his own action. In addition to submitting a large amount of irrelevant material, peti-

17. The four months allowed by the Board's Regulations for an appeal of an Appeals Council decision to the Board is clearly ample, particularly since the sole act necessary for taking such an appeal is the filing of an executed appeals form. Cf. *Yakus* v. *United States,* 321 U. S. 414 (1944) (60 days for protest of O. P. A. Administrators Regulations); *Farncomb* v. *Denver,* 252 U. S. 7 (1920) (60 days to appeal property assessments); *Sullivan* v. *United States,* 116 F. (2d) 576 (C. A. 6th, 1941) (60 days to appeal to Director of Veteran Affairs from War Insurance Council); *Red River Broadcasting Co.* v. *Federal Communications Commission,* 98 F. (2d) 282 (C. A., D. C., 1938), *cert. denied,* 305 U. S. 625 (1938) (20 days within which to petition for rehearing); 28 U. S. C. § 2107 (except as otherwise provided, 30 days to appeal civil suits from district court to court of appeals).

tioner also, as previously shown, interrupted the process of adjudication by premature court action.[18] Most important, however, is the fact that it was not until July 18, 1946, after dismissal of a second law suit,[19] that petitioner asked the Board to reopen his case upon the basis of his new contention that he was in the active service of the Southern Pacific Company on and after August 29, 1935 (Pet. R. 394-400). This contention was carefully investigated and expeditiously handled by the adjudicative units of the Board. After the Appeals Council decision was communicated to petitioner on November 29, 1948, petitioner did not appeal to the Board but permitted practically an entire year to lapse before commencing this proceeding on or about November 29, 1949. In any event, petitioner's belief that an appeal to the Board would be "useless" is not sufficient to excuse his failure to pursue that relief. *Red River Broadcasting Co.* v. *Federal Communications Commission*, 98 F. (2d) 282 (C. A., D. C., 1938), *cert. denied*, 305 U. S. 625 (1938). In that case the Court of Appeals, in dismissing a similar contention, stated as follows (p. 288):

> "Appellant seeks further to excuse its failure affirmatively to seek administrative relief, by contending that, even if it had attempted to do so, its request would have been denied; consequently, that its attempt would have been a futile and useless gesture. We cannot assume that consequence. If under such circumstances relief had been sought and denied, then there would have been a basis for appeal. As was said by the Supreme Court in *Highland Farms Dairy* v. *Agnew*, 300 U. S. 608, 616, 617, 57 S. Ct. 549, 553, 81 L. Ed. 835: 'One who is required to take out a license will not be heard to complain, in advance of application, that there is danger of refusal * * *. He should

18. *Walter Francis John Shelley, complainant* v. *The Railroad Retirement Board, et al., defendants* (U. S. D. C., S. D. Cal., Central Div.), Civil Action No. 843-M.

19. *Walter Francis J. Shelley, plaintiff* v. *Railroad Retirement Board, defendant* (U. S. D. C., S. D. Cal., Central Div.), Civil Action No. 3845-PH.

apply and see what happens.' See, also, *Goldsmith* v. *Board of Tax Appeals, supra.* So, in this case appellant should have sought its remedies and awaited the action of the Commission. It cannot be heard to complain in this court that there was danger of refusal when it made no effort to do so. See, also, *Bourjois* v. *Chapman,* 301 U. S. 183, 188, 57 S. Ct. 691, 694, 81 L. Ed. 1027; *Pacific Tel. & Tel. Co.* v. *Seattle,* 291 U. S. 300, 54 S. Ct. 383, 78 L. Ed. 810; *United States* v. *Illinois Central R. R. Co., supra; Lehon* v. *City of Atlanta,* 242 U. S. 53, 56, 37 S. Ct. 70, 61 L. Ed. 145; *Smith* v. *Cahoon,* 283 U. S. 553, 562, 51 S. Ct. 582, 585, 75 L. Ed. 1264; *Gundling* v. *Chicago,* 177 U. S. 183, 186, 20 S. Ct. 633, 44 L. Ed. 725.''

The Appeals Council decision of which review is sought in this proceeding was not appealed by the petitioner to the Board. Petitioner did not pursue his claim to a conclusion before the Board and therefore did not exhaust the administrative remedies available before the Board. Accordingly, the Court lacks jurisdiction of this proceeding. *Aircraft and Diesel Corp.* v. *Hirsch,* 331 U. S. 752 (1947).

II.

EVEN WERE THE APPEALS COUNCIL DECISION CONSIDERED A DECISION OF THE BOARD, SUCH DECISION SHOULD NOT BE SET ASIDE SINCE IT IS SUPPORTED BY THE EVIDENCE AND HAS A REASONABLE BASIS IN LAW.

A. Decisions of the respondent Board are not to be disturbed if they are supported by the evidence and have a reasonable basis in law.

Section 5(f) of the Railroad Unemployment Insurance Act (45 U. S. C., 1946 Ed., § 355(f)), incorporated into the judicial review provisions of Section 11 of the Railroad Retirement Act (45 U. S. C., 1946 Ed., § 228k), con-

tains a specific limitation upon the scope of review as follows:

> "The findings of the [Railroad Retirement] Board as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive."

In accordance with the plain meaning of this language, the courts have held that in reviewing Board decisions on claims for benefits, the findings of the Board are not to be disturbed if supported by the evidence and not based on an error of law. *Squires* v. *Railroad Retirement Board,* 161 F. (2d) 183 (C. A. 5th, 1947); *Barton* v. *Railroad Retirement Board,* 177 F. (2d) 710 (C. A. 3rd, 1949); *Monahan* v. *Railroad Retirement Board,* 181 F. (2d) 751 (C. A. 7th, 1950); *Dunne* v. *Railroad Retirement Board,* ..... F. (2d) ..... (C. A. 7th, decided June 5, 1950).

In the *Squires* case, the court stated (p. 183):

> "The decisions have long settled it that the case made before the Board is not retried. The decision of the Board is tried if it be in tune with fact and law, that is, if it finds support in the evidence and be not based on error of law. An examination of the record made before the Board and a testing of its decision under the applicable rule discloses a meticulous concern that petitioner's case be fully presented and fairly tried, findings based upon a most careful appraisement and weighing of the evidence, and supported thereby, and a decision in accordance with law. We are bound, therefore, under the statute which affords petitioner the review he seeks 'to enter upon the pleadings and transcript of the record a decree affirming the decision of the Board'."

In the *Dunne* case, the court's opinion stated:

> "The various units of the Board assisted petitioner in every possible manner in developing his claim. Every opportunity was afforded to present supporting evidence in his attempt to justify his right to an annuity as provided by the Retirement Act. Where

> the evidence in the record made before the Board supports the decision of the Board, as it does in this case, and the decision is not based on error of law our only course under the law and authorities is to affirm its decision."

It was well established even before the inclusion of the specific language quoted above in the Railroad Retirement Act that a decision of the Board on a claim for benefits is not a trial *de novo* and that such a decision is not to be set aside if it is supported by substantial evidence in the record before the Board, is not arbitrary or capricious, and has a reasonable basis in law. *South* v. *Railroad Retirement Board,* 131 F. (2d) 748 (C. A. 5th, 1942), *cert. denied,* 317 U. S. 701; *Gardner* v. *Railroad Retirement Board,* 148 F. (2d) 935 (C. A. 5th, 1945), *cert. denied,* 326 U. S. 783; *Ellers* v. *Railroad Retirement Board,* 132 F. (2d) 636 (C. A. 2nd, 1943); *Bruno* v. *Railroad Retirement Board,* 47 F. Supp. 3 (D. C., W. D. Pa., 1942).

B. The decision of the Appeals Council of the Board that petitioner was not on August 29, 1935 in the service of or in an employment relation to, an employer, and therefore was not entitled to credit for service prior to January 1, 1937, toward an annuity is supported by the evidence and has a reasonable basis in law.

The evidence of record amply supports the finding of the Appeals Council that petitioner was not in the active service of an "employer" on August 29, 1935, or in an employment relation to an employer on that date by reason of six months of active service between that date and January 1, 1946. Petitioner has established three months of service in April, May and June 1938 for the Virginia and Truckee Railway, an "employer," but he has failed to establish his claimed service for the Southern

Pacific Company on August 29, 1935, or during the latter part of 1935 and 1936 and the first quarter of 1937.[20]

The record before the Appeals Council clearly shows that petitioner was not in the active compensated service of the Southern Pacific Company on or after August 29, 1935. Petitioner never asserted a claim or presented any evidence to the Board to show that he was in the active service of the Southern Pacific Company on or after August 29, 1935, until July 18, 1946, when he filed his petition for a reopening of his claim following the dismissal of his second action in the District Court. During the very period in which petitioner later claimed to have performed service for the Southern Pacific Company, he requested the Board by letter dated November 14, 1936, to send him application forms and stated that the Southern Pacific Company had turned him "off in 1931, after promising me that when times improved, I would be re-employed and allowed all my seniority rights. This they have never done * * *" (App. 1). On January 11, 1937, petitioner filed with the Board an application for an annuity under the Railroad Retirement Act, asserting that he was not then employed by a carrier and that he last worked for a carrier, the Southern Pacific Company, in 1932 (App. 3). He further stated in such application that the Southern Pacific Company promised that "when times got better I would be sent for. They never sent. They cancelled my annual pass,[21] my insurance; and all my rights * * *" (App.

20. Apparently petitioner has now abandoned his claim that he rendered service after November 1935 for the Southern Pacific Company. See Petitioner's Brief, page 9.

21. On page 14 of petitioner's brief, he asserts that the fact that the Southern Pacific Company gave his wife an annual pass covering the period 1931 to 1933 shows that he worked for the company during that period, contrary to the company's records. It should be noted, however, that the pass was issued in 1931 while petitioner still held rights to return to service with the Southern Pacific Company, and it was cancelled on June 26, 1931, a few days prior to the termination of such rights on June 30, 1931 (App. 2-3).

4).[22] In reply to the Board's questionnaire, petitioner, on February 9, 1937, declared that he had not worked for a railroad since August 28, 1935, that he was on leave since that date because the Southern Pacific Company would not give him work, and that he last worked for a railroad or carrier in the fall of 1931 or 1932 (App. 4, 5). In a completed questionnaire dated November 22, 1937, the Southern Pacific Company reported that petitioner, as of August 29, 1935, was not on furlough, leave of absence, absent on account of sickness or disability, or subject to call for service. The company also stated that petitioner's "last compensated service [was] performed November 25, 1930" and that he "lost rights to return to service after being off six months" (App. 5, 6).

By letter dated May 4, 1938, petitioner informed the Board that he had secured employment with the Virginia and Truckee Railway (App. 7, 8), and on June 23, 1938, he filed another application for an annuity under the Railroad Retirement Act claiming service with that railway from April to June, 1938 (Pet. R. 35-40). In this application petitioner reiterated his statement that he was not in the active service of an employer on August 29, 1935, and asserted that he had been retired by the Southern Pacific Company about June, 1932 (Pet. R. 35). Again in a letter to the Board, dated November 5, 1938, petitioner stated: "after I was laid off in Oct., 1932, I made it my

22. In his brief (pp. 11, 17, 26), petitioner charges that the Southern Pacific Company has defrauded him of contract rights for a pension, and, in effect, that the Board has aided such a fraud by denying him an annuity under the Railroad Retirement Act based on all his railroad service. Any contract rights petitioner might have had for a private pension would, however, neither affect nor be affected by the Board's determination with respect to his eligibility for such an annuity under the Railroad Retirement Act, since such eligibility depends solely upon the provisions of the Act; indeed, Section 7 (45 U. S. C., 1946 Ed., § 228g) expressly states that the Act shall not "be taken as terminating any trust heretofore created for the payment of * * * pensions or gratuities." And any deductions that petitioner claims to have been made from his Southern Pacific salary in this connection could not possibly have been related to the taxes levied under the Railroad Retirement Tax Act (See Footnote 2, *supra*), since that Act became effective as of January 1, 1937.

business to regularly go around and try to get on, but my Foreman, Mr. B. J. Van Slyck, always advised me there was no work they could give me to do" (App. 14). In response to a questionnaire, the Southern Pacific Company on December 12, 1939, advised (App. 18-20) that petitioner was separated from its service on November 25, 1930, for the reason that he was "laid off account reduction in force, seniority rights to continue six months under agreement with the B of RC," explaining in greater detail as follows (App. 20):

> "Mr. Shelley was not on the telegraphers' seniority roster at the time of his termination of service. In February, 1929 he transferred from the telegrapher-clerk seniority roster to the freight clerks' roster and placed on that roster effective July 1, 1929. On July 1, 1930, his name did not appear on the roster of the telegraphers. On July 1, 1931, his name was dropped from the freight clerks' roster account no service performed in past six months, this in accordance with clerks' agreement. * * * Therefore, Mr. Shelley's name did not appear on any seniority roster of this company on August 29, 1935."

This information was corroborated by a letter of the local Chairman of the Order of Railroad Telegraphers, System Division No. 53, to Mr. D. J. Russell, Superintendent of the Southern Pacific Company, dated November 30, 1939, in which it is stated that petitioner's name did not appear on the telegraphers' seniority list issued July 1, 1930, although it had been shown on the list issued January 1, 1930 (App. 21).

In each of the steps subsequently taken by petitioner after he was advised by the initial adjudicating unit of the Board that he was not entitled to credit for service prior to January 1, 1937 (App. 23-24), namely, the first court action which was dismissed for failure to exhaust ad-

ministrative remedies,[23] the appeal to the Appeals Council which sustained the decision of the initial adjudicating unit (App. 24-25), the appeal to the Board which affirmed the decision of the Appeals Council (App. 39-59, especially at 42), and the commencement of the second law suit,[24] petitioner did not challenge the fact that he ceased active service for the Southern Pacific Company in 1930 and was not in the active service of that company on and after August 29, 1935, but claimed rather that he was on leave from and had rights to return to the service of that company on and after that date.[25]

It was not until July 18, 1946, when petitioner requested the Board to reopen his case, that petitioner first raised with the Board the new contention that he was in the active service of the Southern Pacific Company in the latter half of 1935 and 1936 as well as in the period from January to March, 1937 (Pet. R. 394-400, 409-428, 430, 440, 441, 445, 509, 510, 570-572; App. 61-67, 75, 76). The pay-roll and other compensation records of the Southern Pacific Company were exhaustively investigated and the company completed and returned three separate questionnaires signed by responsible officials in which it reported that petitioner was not in its service during the periods claimed by him on or after August 29, 1935 (App. 67-74, 78-81, 97-99). The

23. Complaint in *Walter Francis John Shelley, complainant* v. *Railroad Retirement Board, et al., defendants* (U. S. D. C., S. D. Cal., Central Div.), Civil Action No. 843-M.

24. Complaint in *Walter Francis J. Shelley, plaintiff* v. *Railroad Retirement Board, defendant* (U. S. D. C., S. D. Cal., Central Div.), Civil Action No. 3845-PH.

25. See also in this connection letter from petitioner to the Chairman of the Board dated September 29, 1942 (App. 38, 39) in which he stated the following:

> "During the great depression of 1932 and 1933 when the Company reduced its Staff, a great number of reductions were made in every department, and myself with others were laid off. * * *
>
> "Mr. T. H. Williams wrote me in 1932 that he would try and help me by appointing me to a position not covered by any Union Agreements, and he recommended that I keep on trying, and not attempt to have my Seniority as a Telegrapher changed from the O. R. T. Roster, and had he lived I know I would have received such an appointment. * * *"

company also furnished identifications of the individuals who, during these periods, occupied the positions in which petitioner claimed to have worked, and the petitioner's name was not included (Pet. R. 545, 546; App. 100). Although petitioner stated that he was paid by the company in the regular manner (Pet. R. 457-458; Petitioner's Brief, pp. 16-17),[26] the company's files and pay-roll records were especially checked by Mr. J. S. Cunningham, Secretary of the company's Board of Pensions, and Mr. H. R. Gernreich, Superintendent at Los Angeles, and both reported that the records failed to reveal the service claimed by petitioner on and after August 29, 1935, Mr. Gernreich stating that "there is nothing in our files to indicate that he [petitioner] performed any service for this company after being cut off in November, 1930" (App. 96, 100).[27]

26. Contrary to the assertion in petitioner's brief (pp. 16-17, 25) that the Board's inquiry as to the manner of payment for the claimed services was intended to excuse lack of company records or to suggest a factual situation precluding employee status, the inquiry obviously was intended to explore a possible ground for reconciling an actual performance of the claimed service with the absence of petitioner's name from the Company's detailed payroll records. In such case, if certain additional facts could have been shown, it might have been possible to find an employee status.

27. Petitioner's contention in his brief (pp. 10, 11, 13, 14, 15) that the Southern Pacific Company lacked records from which it could be determined whether he was employed on and after August 29, 1935, is without foundation. Petitioner erroneously assumes from a statement that check receipts were destroyed after six or seven years (Pet. R. 511, 546), that no records at all were kept by the Southern Pacific Company after such a lapse of time. This is not true. Only check receipts were not kept (Pet. R. 511, 546); pay-roll and other personnel records were retained by the company (App. 10, 11, 67-74, 78-80, 96, 97-99, 100; Pet. R. 545, 546). In fact, the regulations of the Interstate Commerce Commission require the company to retain pay rolls permanently. 49 CFR 111.1. Moreover, even such check receipts were in existence when information was obtained from the company in 1937 and 1938, only two and three years after August 29, 1935 (App. 5, 6, 10, 11). In this connection it should also be noted that petitioner confuses statements of various officials that records were not kept at their offices and referring petitioner to the proper record-keeping office as statements that the company had no records (Pet. R. 540, 563; App. 9, 10-11). Further, petitioner's claim in his brief (pp. 10, 13-14, 20) that inadequacy of company records is shown by the company's failure to verify some of his early service with it (1904-1905, 1918-1920), such service having been verified by the Post Master General, is clearly erroneous in the light of the company's full report of this service (App. 10-11) and the Post Office Department communication of May 9, 1938 (Pet. R. 47) which verified only service with that Department. There is not the slightest indication in the record that the Southern Pacific Company did not maintain adequate records from which it could be determined whether petitioner was in its active service on and after August 29, 1935 (App. 10, 11, 67-74, 78-80, 96-99, 100; Pet. R. 545, 546).

A search of the wage reports filed by employers with the Board revealed only three months of service subsequent to January 1, 1937, performed for the Virginia and Truckee Railway (App. 77).

It is clear from these facts and circumstances that there is sufficient evidence to support the finding that petitioner was not in the active compensated service of the Southern Pacific Company on and after August 29, 1935. Indeed, this is the only reasonable conclusion that could have been reached. The only evidence submitted by petitioner to establish his claimed service for the Southern Pacific Company on and after August 29, 1935, consists of depositions, affidavits and statements which are vague, indefinite and unreliable, and are not adequately supported by records, documents, or other sources which would enable the individuals to recall events occurring some ten years previously. For example, in connection with petitioner's claim of active service at Firestone Park Station from August 20, 1935 to September 9, 1935, the statements of Hurt (Pet. R. 415-418), Mahan (Pet. R. 421-423), Lynn (Pet. R. 440), Hansen (Pet. R. 441), Beck (Pet. R. 445, 509) and Krug (Pet. R. 510), do not assert that petitioner was at Firestone Park at any exact dates but state very indefinitely that it was in 1935.[28] Hansen who was a freight clerk at the Los Angeles Freight Station (Pet. R. 441), merely recalls "Mr. Shelley going to the Firestone Park Station in 1933, and again in 1934 and also in 1935," and Beck (Pet. R. 509) states he "remembers seeing Mr. Shelley apply, week after week and month after month in 1933, 1934 and 1935". Lynn (Pet. R. 440), Hansen (Pet. R. 441), Beck (Pet. R. 445), and Krug (Pet. R. 510) refer to Mr. Mahan as agent at Fire-

28. Hurt (Pet. R. 418): "It would be in 1935."
Mahan (Pet. R. 422-423): "in 1933 and once or twice * * * in 1934 and 1935. That is all I remember."
Lynn (Pet. R. 440): "The following year, 1935."
Hansen (Pet. R. 441): "also in 1935."
Beck (Pet. R. 445): "In the year 1935." (See also R. 509.)
Krug (Pet. R. 510): "Also in 1935 at Firestone."

stone Park Station, although the company reported that during the months of August and September, Firestone Park Station was under the jurisdiction of the Los Angeles agent and the position was filled by Mr. R. Riggs (App. 100).

With respect to the deposition of Sims (Pet. R. 410-413), who stated that he was relieved by petitioner at Santa Susana for about three weeks commencing "just about September 10, 1935," it should be noted that the company reported that its records show that Mr. Sims filled the position at Santa Susana during the entire month of September, the company further stating that petitioner did not perform any service for it after November 1930 (App. 100).[29] The company's report likewise contradicts the affidavit of Finlay that he saw petitioner at Santa Susana (Pet. R. 570-572). Moreover, Finlay was not an employee of the Southern Pacific Company; according to his statement, he merely visited Shelley in a few instances on personal business; his statements are not adequately supported, and his assertion that he saw Shelley working at Santa Susana on September 28, 1935, conflicts with petitioner's statement that he ceased service at Santa Susana on September 25, 1935 (Pet. R. 571-572; App. 65). Finally, the Fansler deposition (R. 426-427) is likewise indefinite concerning the service claimed to have been performed at Ventura, stating it was performed "about October 1935."

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29. Some indication of the vague character of Mr. Sims' testimony and his susceptibility to suggestion is revealed by the following excerpt from his deposition (Pet. R. 411-413):

"Q. Did you ever hear where Mr. Shelley came from and had been working before he came to Santa Susana?

A. I understand he came from Firestone Park where he had been relieving the Agent and Night Clerk before he came to Santa Susana.

* * * * *

Q. Do you remember where he went from there after he left you—or did you hear where he went?

A. I don't believe I heard. Did you tell me where you went?

Q. Yes, I told you I went to Ventura and relieved the agent there.

A. I forgot that.

Q. What was your answer to that question?

A. Well, of course you told me that you went to Ventura, but I had forgot."

The depositions, affidavits and statements submitted by petitioner are completely contradicted by his own statements and contention before the Board and the courts until November 1945 that he had been separated from the service of the Southern Pacific Company and was on leave from that company on and after August 29, 1935 (App. 1, 2, 3, 4, 5, 7, 8, 14-15, 24-26, 38-39; Pet. R. 35; Footnotes 23 and 24). Some of these statements were made by petitioner in 1936 and 1937 immediately after and during part of the time he later claimed he performed active service for the Southern Pacific Company (App. 1, 2, 3, 4, 5, 75-76). If petitioner did perform active service for the Southern Pacific Company on and after August 29, 1935, as claimed, there would have been no reason for his ineffectual attempt, by seeking and accepting short-term employment with the Virginia and Truckee Railway in 1938, to qualify for an annuity based on all his railroad service (App. 6, 7, 8). In addition, it is extremely unlikely that petitioner could have performed service for the Southern Pacific Company in 1933, 1934 and 1935, as alleged in the depositions, affidavits and statements submitted by petitioner, without the company having knowledge or trace of at least some such service. When petitioner's own prior statements and actions are considered together with the record information furnished by the Southern Pacific Company, the conclusion is inescapable that petitioner was separated from the active service of the Southern Pacific Company prior to 1935 and was not in the active service of that company on or after August 29, 1935.

Since the depositions, affidavits and statements submitted by petitioner were executed more than ten years after the service is claimed to have been performed, it is understandable that the memories of the individuals making such depositions, affidavits and statements would be quite faulty, and the fact that the petitioner merely ap-

plied for work many years ago may be converted into a present belief that petitioner was then actually working for the company.[30]

The weight to be accorded the evidence submitted in this case as well as the inferences to be drawn therefrom are matters within the province of the Board; even if conflicting inferences were possible, the Board's exercise of judgment should not be disturbed where it is shown to have a rational basis. *Ellers* v. *Railroad Retirement Board,* 132 F. (2d) 636 (C. A. 2nd, 1943); *Watts* v. *Railroad Retirement Board,* 150 F. (2d) 113 (C. A. 5th, 1945). In the *Ellers* case, the court stated (pp. 639-640):

> "The district judge * * * apparently came to the conclusion that the evidence relied on by the Board in support of its decision was unsubstantial because it consisted of reports, answers to questionnaires and letters none of which was under oath, whereas Ellers' principal evidence consisted of Nolan's and his own affidavits. In drawing a distinction between sworn and unsworn evidence and ascribing controlling weight to the former we think the court was in error.
>
> "Administrative agencies are usually not restricted to the same rules of evidence as apply in court proceedings, even in the absence of an express statutory provision on the subject. See *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420, 443, 50 S. Ct. 220, 74 L. Ed. 524; *John Bene & Sons* v. *Fed. Trade Commission,* 2 Cir., 299 F. 468, 471; Evidence in the Administrative Process, 55 Harv. L. Rev. 365, 379. While the Board is given power to compel the attendance of witnesses, administer oaths and take testimony, 45 U. S. C. A. § 228j(b)4, its administration of the Acts is not confined to information obtained by testimony. The same section authorizes it to 'make all necessary investigations in any matter involving annuities or other payments'; and to 'require all employers and

30. The authorities cited by petitioner on page 24 of his brief not only fail to support his contention as to the credibility of the depositions, affidavits and statements furnished by him, but, on the contrary, indicate that such evidence is not reliable.

employees * * * to furnish such information and records as shall be necessary for the administration' of the Acts. If an employer wilfully refuses to make a report or knowingly reports false information he is subjected to severe criminal penalties by § 13 of the Act, 45 U. S. C. A. § 228m. It is clear, therefore, that in adjudicating claims for annuities the Board is permitted to consider evidence which would be objectionable in a court of law, and if it is of a kind on which fair-minded men are accustomed to rely in serious matters, it can support an administrative finding. See *National Labor Relations Board* v. *Remington Rand,* 2 Cir., 94 F. 2d 862, 873. The evidence received was of this character. The weight to be accorded it was for the Board to determine. Even when a court upon a consideration of all the evidence might reach a different conclusion, it may not substitute its own for the administrative judgment. See *Swayne & Hoyt, Ltd.* v. *United States,* 300 U. S. 297, 304, 57 S. Ct. 478, 81 L. Ed. 659; *Holloway* v. *Railroad Retirement Board,* D. C. N. D. Ga., 44 F. Supp. 59, 62. Rejecting, as we do, the theory that statements in affidavits must necessarily prevail over unsworn reports by officers of the railroad or agents of the Board we are satisfied that the Board's decision finds substantial support in the evidence and was not arbitrary or capricious."

Similarly in the *Watts* case, *supra,* the court said (p. 115):

"A careful study of the record here leaves us in no doubt that this is peculiarly a fact case, and that it was peculiarly for the Board to say whether the inference to be drawn from the testimony as a whole was that plaintiff was, or that he was not, totally and permanently disabled. The district court was, therefore, right in declining to set aside or otherwise interfere with the Board's findings and decision."

It is clear from the foregoing that the finding that petitioner was not in the active service of an employer on August 29, 1935, and did not perform service for an em-

ployer in six calendar months between that date and January 1, 1946, is amply supported by the evidence. It follows that he was not an employee on August 29, 1935, and is not entitled to credit for service prior to January 1, 1937, toward an annuity.

CONCLUSION.

For the reasons set forth above, respondent respectfully submits that the petition in this proceeding should be dismissed and judgment entered in its favor.

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